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AND CASES IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

◆

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Landlord and Tenant (*War Damage*) (*Amendment*) (4 & 5 *Geo.* 6, *c.* 41), *s.* 10, *sub-s.* 1. *In re* ORBIT TRUST, LD.'S LEASES **Uthwatt J. 144**

War Damage (4 & 5 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 1 (*a*). *In re* WATFORD CORPORATION'S AND A. S. WARE'S CONTRACT - - **Simonds J. 82**

ERRATA.

p. 59, headnote, 5 lines from bottom: for "mortgagees" read "mortgagors."

p. 153, last line but one: for "1295" read "1786."

p. 305, headnote, line 6, and main text, line 16: for "next of kin" read "next friend."

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re HOME REMEDIES, LIMITED.

SIMONDS J.

1942
Oct. 26.

Company—Voluntary liquidation—Creditor's right to order for compulsory winding-up—Wishes of majority of creditors—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 255.

The rule still prevails that, where a company is in voluntary liquidation and a petition is presented for its compulsory winding-up, the court is bound to have regard, not only to the wishes of the petitioning creditor, but also to those of all the creditors. The rule is not affected by the provision in s. 255 of the Companies Act, 1929, that the voluntary winding-up of a company shall not bar the right of any creditor to have it wound up by the court.

In re James Millward & Co., Ld. [1940] Ch. 333 distinguished.

PETITION.

In October, 1935, Home Remedies, Ld., was incorporated as a limited company under the Companies Act, 1929. On May 5, 1942, a creditor began an action against the company for the recovery of 750*l.* lent by him to the company, and in due course he obtained judgment against the company. On August 19 and 20, 1942, at separate meetings of the company and of the creditors, it was resolved that the company be wound up and a liquidator was appointed. On October 25, 1942, the judgment creditor presented this petition for the compulsory winding-up of the company. The petition was opposed by the company and the liquidator, and nearly all the creditors were in favour of the continuance of the voluntary liquidation.

Humphrey King for the petitioning creditor. Although a substantial majority of the creditors are in favour of the continuance of the voluntary liquidation, on the true construction of s. 255 of the Companies Act, 1929 (1), the petitioning creditor is entitled to a compulsory winding-up order: see *In re James Millward & Co., Ld.* (2).

W. F. Waite for the company and the liquidator. The old law, that the court shall not make a compulsory winding-up order without due regard to the interests of all the creditors, still prevails: see s. 170, sub-s. 2, of the Companies Act, 1929. That principle is not affected by s. 255 of the Act nor by the decision in *In re James Millward & Co., Ld.* (2).

SIMONDS J. No reason has been shown why a compulsory order is necessary to protect the rights of the petitioning creditor or any other creditor, but counsel for the petitioner claims that the court is bound to make an order in his favour in spite of the opposition. In *In re James Millward & Co., Ld.* (2) it was decided that, on the true construction of s. 255 of the Companies Act, 1929, a creditor of a company in voluntary liquidation, on proving his judgment debt and that it has not been satisfied, is, as between himself and the company, entitled ex debito justitiae to an order for the compulsory winding-up of the company. That case, however, did not decide that the old rule of the court that, where a company is in voluntary liquidation, the court, before making an order for its winding-up, is bound to have regard not only to the wishes of the petitioner but also to those of the other creditors, has been abrogated. It is true that s. 255 of the Companies Act, 1929, has made an alteration in the law so that it is no longer necessary for a petitioning creditor to show that he is prejudiced by a voluntary liquidation, but, as between himself and the other creditors, the old rule remains, and the court has to consider the wishes of all the creditors. If the majority of the creditors wish to continue the voluntary liquidation and no valid reason is shown why effect should not be given to their wishes, the court will not make a winding-up order. There is nothing in the decision in *In re James Millward & Co., Ld.* (2) to the contrary. Here the great majority of the creditors are in favour of a continuance of the voluntary winding-up and no suggestion has been made that in such a winding-up the interest of any creditor will be prejudiced. I must dismiss the petition.

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(1) By s. 255 of the Companies Act, 1929: "The [voluntary] "winding-up of a company shall "not bar the right of any creditor "or contributory to have it wound "up by the court . . . ."

(2) [1940] Ch. 333.

Solicitors: *Godfrey, Teesdale & Co.; Murray Napier & Co.*

J. L. D.

FARWELL J.
1942
Oct. 28.

In re WESTRIK.

PUBLIC TRUSTEE *v.* MIDDLESEX HOSPITAL AND OTHERS.

Will—Annuity—Will made before September 3, 1939*—Annuity free of income tax—Trust for residuary legatees—Deed of appropriation and release executed in* 1940*—Fund out of estate to answer annuities—Balance to residuary legatees—Variation of provision in will—Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

A testator died in 1933 having, by his will made in 1930, bequeathed annuities free of income tax to four annuitants and directed his trustee to stand possessed of his residue in trust for five residuary legatees in equal shares. In 1940 a deed to which the residuary legatees and the annuitants were expressed to be parties was executed, providing that a fund to pay the annuities should be set aside and the balance of the estate paid to the residuary legatees. Three of the annuitants were in enemy occupied territory and could not execute the deed, to which, therefore, the sanction of the court was obtained:—

Held, that the deed was not a variation of the provision in the will within s. 25, sub-s. 1, of the Finance Act, 1941, and that the annuities were, therefore, payable at the reduced rate prescribed by that sub-section.

ADJOURNED summons.

By his will dated July 12, 1930, the testator, Theodore Westrik, bequeathed an annuity of 100*l.* free of income tax to each of four annuitants, three of whom lived in Brussels, and he directed his sole executor and trustee (the Public Trustee) inter alia to stand possessed of the capital of his residuary trust fund after his widow's death on trust to divide it equally between five named charities. He died on August 24, 1933, and during the widow's life the annuities were paid out of the income of his estate. The widow died on December 30, 1938. The charities did not wish the distribution of the capital of

FARWELL J.

1942

WESTRIK, In re. PUBLIC TRUSTEE v. MIDDLESEX HOSPITAL.

the trust fund to be postponed until the death of the last surviving annuitant, and it was, therefore, agreed that a fund to answer the annuities should be set aside out of the estate, and the rest of the estate should be exonerated from them. On August 6, 1940, a deed recording and carrying out that agreement was executed. The parties were the charities, the annuitants and the Public Trustee, the annuitants living in Brussels having agreed to the arrangements but being unable to execute the deed as Belgium had by then been invaded. The deed was carried into effect pursuant to an order of July 29, 1940, that, on setting aside and retaining a fund to answer the subsisting annuities, the Public Trustee should be at liberty to distribute the balance of the residue in conformity with the deed and otherwise to give effect to it although the annuitants in Brussels had not executed it. By the present summons the Public Trustee asked whether he ought to pay the annuities at the reduced rate provided by s. 25, sub-s. 1, of the Finance Act, 1941, or at the full rate free of income tax without regard to the sub-section (1).

Wilfrid Hunt for the Public Trustee.

Richmount for the Middlesex Hospital, a residuary legatee. The annuities are payable at the reduced rate prescribed by the sub-section. The "provision," for the purposes of the sub-section, is the clause in the will providing them, and the deed of appropriation and release has not varied that provision, being merely a document of machinery to aid the administration of the estate.

Jopling for an annuitant. The case does not come within the sub-section, and, therefore, the annuities are payable at the full rate, free of income tax. The annuitants had a charge on the whole of the income of the estate. They entered into a contract under which the estate was to be handed over to the residuary legatees, and it is under that contract that the annuities are now payable to them. "Varied" in s. 25, sub-s. 1 (*c*), cannot be limited to a variation in the amount of the annuities. It can extend, as it does in the present case, to the method of providing for them.

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(1) By Finance Act, 1941, s. 25, sub-s. 1: "Subject to the provisions of this section, any "provision, however worded, for "the payment, ... of a stated "amount free of income tax . . . . "which—(*a*) is contained in any ". . . . will . . . . and (*b*) was made "before September 3, 1939; and "(*c*) has not been varied on or "after that date, shall, as respects "payments falling to be made "during any year of assessment, "the standard rate of income tax "for which is ten shillings in the "pound, have effect as if for the "stated amount there were substituted an amount equal to "twenty twenty-ninths thereof."

FARWELL J. In my opinion, the deed has not varied the provision in the will.

The will was made before September 3, 1939, namely in 1930. In August, 1940, the beneficiaries (the annuitants and the charities) agreed that the capital of the estate should be paid over to the charities, subject to a part of it being set aside to answer the annuities and the income tax thereon. They agreed that the annuitants should forgo their right under the will to have their annuities charged on the whole estate and should rely entirely on the sum which they agreed should be set aside and that the balance of the estate should be divided among the charities. That arrangement was to enable the charities to get immediate payment instead of waiting until after the death of the last annuitant. The parties were entitled to come to that agreement, and this court has approved of it, but, in my view, on the true construction of s. 25, sub-s. 1, of the Act of 1941, it does not constitute a variation of the will. The annuities, therefore, are payable at the reduced rate prescribed by the sub-section.

Solicitors: *Freeman, Haynes & Co.; Vandercom, Stanton & Co.; Sheard, Breach & Co.*

K. R. A. H.

In re SHARMAN'S SETTLEMENT.

PUBLIC TRUSTEE *v.* SHARMAN.

BENNETT J.
1942
Oct. 26.

Settlement—Construction—Life interest in settled fund—Covenant to make up annual income to 3000l. after deduction of income tax and payment of super-tax—Death of annuitant—Assessment to sur-tax payable after death—Liability of settlor's estate—Exoneration of annuitant.

By a settlement made in 1928 the trustees were to pay the income of the settled funds during her life to the settlor's former wife, from whom he had been divorced, and, if such income, after deduction of income tax and super-tax, fell short of 3000*l.*, the settlor covenanted with the annuitant and the trustees to pay to

BENNETT J.

1942

SHARMAN'S SETTLEMENT, *In re.*

PUBLIC TRUSTEE *v.* SHARMAN.

the annuitant or her personal representatives such an amount as after making such deductions should bring the net income up to 3000*l.* a year and so in proportion for any less period. In November, 1928, the settlor died. The annuitant died in December, 1939. She was assessed to sur-tax payable in January, 1940, and her personal representatives were assessed to sur-tax payable in January, 1941 :—

Held, that the settlor's estate was liable to pay the whole of the sur-tax on the annuitant's income from the trust fund, whether such tax was payable during her life or became payable after her death.

ADJOURNED summons.

By a settlement dated January 16, 1928, and made between John Earl Sharman, Kate Isabel Sharman and the trustees thereof, the settlor covenanted to transfer to the trustees certain stocks, funds and securities specified in the schedule thereinafter described as the trust fund. By cl. 4 the trustees were to pay the income of the trust fund to Kate Isabel Sharman during her life, and subject thereto the same was to be held on certain trusts not material to be stated. By cl. 10 : "If and whenever during the life of the said Kate Isabel "Sharman the net income of the trust fund in any year after "deducting income tax and super-tax and any other tax on "income falls short of 3000*l.*, the covenantor will forthwith "pay to the said Kate Isabel Sharman or her personal "representatives by way of additional provision for mainten-"ance such an amount as after making the deduction aforesaid "shall be necessary to make up the said net income for such "year to 3000*l.* and so in proportion for any less period than "a year." The settlor's marriage with Kate Isabel Sharman had been dissolved in 1926. The settlor died on November 26, 1928. Kate Isabel Sharman died on December 22, 1939. At that date she had been assessed to sur-tax, payable on January 1, 1940, for the fiscal year which ended on April 5, 1939, on the income which she had received from the trust fund between April 5, 1938, and April 5, 1939. Her legal personal representatives either had been or would be assessed to sur-tax, payable on January 1, 1941, in respect of her income between April 6, 1939, and December 22, 1939, and this income would include the income which she received from the trust fund which after deduction of income tax and super-tax was now less than 3000*l.* a year. By the present summons the trustees sought an answer to the question whether, on the true construction of the settlement and in the events which had happened of the income of the trust fund therein defined being less than 3000*l.* a year, the estate of the settlor ought, in ascertaining the amount of the deficiency in any year, to be debited with the amount of the sur-tax attributable to the annuity for that year, whether such sur-tax became payable before or after the death of Kate Isabel Sharman.

J. V. Nesbitt for the trustees.

Harold Lightman (for *R. W. Goff*, on war service) for the legal personal representatives of Kate Isabel Sharman. The testator's estate is liable for the amount of sur-tax attributable to income paid or payable to Mrs. Sharman during her lifetime, whether such sur-tax became payable before or after her death. It was intended that Mrs. Sharman should enjoy a net sum at the rate of 3000*l.* a year, and it is, therefore, plain that the testator's estate is liable for instalments of sur-tax payable after her death. Otherwise she will not have received this net sum. Sur-tax is a deferred instalment of income tax: Finance Act, 1927, s. 42. The question raised on this summons was left open in *In re Hulton* (1).

Donald Cohen for beneficiaries interested in the testator's estate. It is admitted that the sur-tax assessed on Mrs. Sharman during her life in respect of the income from the trust fund is a liability of the testator's estate, but all sur-tax assessed on that income which did not become payable until after her death ought to be borne by her personal representatives.

Wilfrid Hunt, H. A. Rose, Heckscher, Hewins, W. F. Waite, F. C. Watmough, and *Pascoe Hayward* for other beneficiaries supported the latter argument.

BENNETT J. The question which I have to decide is whether the settlor's estate is, or the legal personal representatives of Kate Isabel Sharman are, liable to pay the assessments of sur-tax in respect of the income of the trust fund which she received down to April 5, 1939, and from then to December 22, 1939, the proportion of these two assessments being calculated in accordance with the decision in *In re Bowring* (2). The answer to that question depends, I think, entirely on the true construction of cl. 10 of the settlement of January 16, 1928. It is by no means clear to me (although Mr. Lightman said

(1) [1931] 1 Ch. 77, 84.

(2) (1918) 34 T. L. R. 575.

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1942
SHARMAN'S SETTLEMENT, *In re.*
PUBLIC TRUSTEE *v.* SHARMAN.

that the language of the deed was plain) that the parties to the deed or the gentleman who drew it foresaw the exact circumstances to which the language of the deed has to be applied. In fact, I do not think that one can fit the language of the deed to the facts, and what one must try to do, is to find out as best one can what was the real intention of the covenantor. The deed does not mention sur-tax. It refers to super-tax, but it is common ground that although the deed referred to super-tax it has to be applied to sur-tax.

In my view, when you get behind the language of the deed the intention of the settlor is seen to be to exonerate his wife, or her legal personal representatives after her death, from all liability which she or they might come under in respect either of income tax or sur-tax by reason of the right which she had during her life to enjoy the income of the settled fund, that is to say, he promised his wife that if during her life she became liable to pay income tax or sur-tax, or after her death her legal personal representatives became so liable, in respect of the income receivable by her or by them from the trust fund he would pay those liabilities. I think, therefore, that the question put to me should be answered by saying that the estate of the settlor ought to be debited with the amount of the sur-tax attributable to the annuity for that year, whether such sur-tax became payable before or after the death of Kate Isabel Sharman.

Solicitors: *Whitfield, Byrne & Dean; Blundell, Baker & Co., for Gordons, Bradford; Warwick Williams & Marchant; Minet, Pering Smith & Co.; Barnes & Butler.*

H. L. L.

BENNETT J.
1942
Oct. 30.

In re SHEPHERD.

HARRIS *v.* SHEPHERD.

Will—Election—Condition requiring legatee to elect whether he will settle reversionary interest—Letters to trustees stating intention to execute settlement—Obligation to execute settlement.

A testator by his will, after giving a life interest in his residuary estate to his widow, directed his trustees after her death to pay the income thereof to his son upon protective trusts, but subject to a proviso that the son should not become entitled to any interest under the will unless and until he made a settlement of all his interests under his grandfather's will, reserving a life interest to himself and his wife. Under the grandfather's will the son was entitled to certain reversionary interests, subject to his mother's life interest therein. Some years after the testator's death, but while his interests under the testator's will were still in reversion, the son wrote letters to the trustees of both wills in which he said that he proposed to execute the settlement required by the proviso. The testator's widow having died, and no such settlement having been made :—

Held, that the son had not bound himself by any contract with the trustees or done any other unequivocal act amounting to an irrevocable election, and that, therefore, he was not bound to execute any settlement.

Scarf v. *Jardine* (1882) 7 App. Cas. 345 distinguished.

ADJOURNED summons.

By his will, dated July 19, 1917, the testator, Edward Shepherd, appointed his wife, Edith Matilda Shepherd ; his son, the defendant, Major P. E. Shepherd ; and Grinling Harris, the plaintiff ; executors and trustees thereof and devised and bequeathed all his real and personal estate to them upon trust to pay the income to his wife during her life and after her death, subject to an annuity and to the proviso as to election following, to pay the income to Major Shepherd during his life unless and until he should have committed or suffered any act or default whereby such income or any part thereof, if belonging absolutely to him, would become vested in or payable to any other person, and after the determination or failure of such trust in the lifetime of Major Shepherd, upon discretionary trusts for the benefit of Major Shepherd or his wife or his children as the trustees should think fit, and subject thereto upon trusts for the children of Major Shepherd. By cl. 5 of the will the testator, after reciting that Major Shepherd was entitled in reversion expectant on the death of the survivor of him (the testator) and his wife to a settled legacy and a share of the residuary estate under the will of his grandfather, Colonel Lambert Pole, who died in 1906, made a declaration as follows : "Now I declare that my said "son shall not become entitled to any interest under this my "will unless and until he shall execute a settlement of his "interests under the said will of the said Lambert Pole, "providing life interests for himself and his wife if she survive "him and unless and until she marry again, it being my "intention that my said son shall be put to his election whether "he shall receive any benefit under this will." On August 23, 1920, the testator died, and his will was proved on November 19, 1920. In 1932 Major Shepherd wrote letters to the trustees of the will of Colonel Lambert Pole and to the plaintiff, as a trustee of the testator's will, informing them that he had elected to make a settlement of his interest under the will of Colonel Lambert Pole, but he had not yet done so. Major Shepherd had, by his wife, the defendant, Ella Shepherd, one son, Lambert Charles Shepherd, who was born in 1911 and was married in 1939 to the defendant, Iris Eunice Shepherd. On May 24, 1941, Lambert Charles Shepherd was killed in action. The testator's widow died on June 24, 1941. The present summons was taken out for the determination (inter alia) of the question whether Major Shepherd was still at liberty to refuse to make a settlement of his interests under the will of Colonel Lambert Pole.

Danckwerts for the plaintiff. Major Shepherd made his election in 1932, and he cannot now change his intention. [He referred to Seton's Judgments and Orders, 7th ed., vol. ii., p. 1531.]

Geoffrey Cross for Major Shepherd and his wife, defendants. Major Shepherd can still elect whether or not he will execute a settlement and take under the will. The letters which he wrote to the trustees in 1932 do not amount to an irrevocable election, for when he wrote them he did so voluntarily and his interest in his father's estate was still in reversion. No person is entitled to say that Major Shepherd is bound to make a settlement because he wrote those letters. *Scarf* v. *Jardine* (1), cited in Seton's Judgments and Orders, is distinguishable on the facts. No case of estoppel has arisen.

J. B. Richardson for Iris Eunice Shepherd.

Bennett J. The question which I have to determine is whether Major Percy Edward Shepherd is still at liberty to refuse to make a settlement notwithstanding the fact that he notified the trustees that he would make a settlement. To determine that question regard must be had to the terms of the will, cl. 5 of which contains the declaration of the testator.

Can any person compel Major Shepherd to execute the settlement? The letters which he wrote in 1932 do not establish any contractual relationship between him and the persons to whom they were addressed, so it is impossible for the recipients of the letters to assert that he bound himself to them by a contract to make a settlement. It has, however,

(1) (1882) 7 App. Cas. 345.

been suggested by Mr. Danckwerts that any unborn children of Major Shepherd would have some equity arising out of the letters which precludes Major Shepherd from saying that he has not bound himself to make a settlement. The argument is founded on a statement in Seton's Judgments and Orders, vol. ii., p. 1531, which is as follows: "When once made, and "communicated to the other parties affected, the election is "final, and cannot be altered." Three authorities are cited in support of that statement, the first of which is *Scarf* v. *Jardine* (1). There, however, the facts were altogether unlike those of the present case, a creditor being in a position to sue one or other of two debtors and thus being able to elect against which of them he would proceed. Lord Blackburn said (2): "The principle, I take it, running through all the cases as to "what is an election is this, that where a party in his own "mind has thought that he would choose one of two remedies, "even though he has written it down on a memorandum or has "indicated it in some other way, that alone will not bind him; "but as soon as he has not only determined to follow one of "his remedies but has communicated it to the other side in "such a way as to leave the opposite party to believe that he "has made that choice, he has completed his election and can "go no further; and whether he intended it or not, if he has "done an unequivocal act—I mean an act which would be "justifiable if he had elected one way and would not be "justifiable if he had elected the other way—the fact of his "having done that unequivocal act to the knowledge of the "persons concerned is an election." The communications in the present case, i.e., the two letters were not sent to persons who were concerned with or affected by Major Shepherd's determination. In those circumstances the question of estoppel cannot arise. There is no one, and never can be anyone, able to say that Major Shepherd is estopped from stating that he did not elect to take under his father's will. I can see no grounds, either in law or in equity, which would enable me to say that Major Shepherd is bound now to make a settlement of the interest to which he is entitled under his grandfather's will. The question, therefore, must be answered by saying that he is at liberty to refuse to do so.

Solicitors for all parties: *Grinling Harris & Co.*

H. L. L.

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(1) (1882) 7 App. Cas. 345.

(2) Ibid. 360, 361.

C. A.

1942

Oct. 20.

In re PARSONS.

PARSONS *v.* ATTORNEY-GENERAL.

Revenue—Estate duty—Will—Legacy—Disclaimer—"Competent to dispose "of"—"During the continuance of the settlement"—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 2; *s.* 22, *sub-s.* 2 (*a*).

A testatrix by her will gave 10,000*l.* 2½ per cent. consolidated stock to her husband absolutely and she directed her trustees to pay the income of her residuary estate to her husband for life and after his death to stand possessed of the residuary trust funds in trust for her son absolutely. She died on June 20, 1937, and the estate duty then payable (including that attributable to the 10,000*l.* stock) was paid. The husband formally disclaimed the legacy by a deed of disclaimer. After his death on August 31, 1940, estate duty was claimed in respect of the 10,000*l.* stock on the ground that, notwithstanding the disclaimer, the husband was "during the continuance of the settlement competent to dispose of" the property within the meaning of s. 5, sub-s. 2, of the Finance Act, 1894:—

Held, that between the dates of the death of the testatrix and the disclaimer the husband was "competent to dispose of" the 10,000*l.* stock; that he was so competent "during the continuance "of the settlement" of the stock which must be taken to have been included in the residuary estate as from the testatrix's death, though subject to being taken out of it, if the husband had not disclaimed the legacy; and, therefore, that the estate duty claimed was payable.

Decision of Farwell J. [1942] Ch. 335 affirmed.

APPEAL from Farwell J. (1).

By her will dated June 29, 1933, the testatrix, Jane Birch Parsons, gave 10,000*l.* 2½ per cent. consolidated stock to her husband absolutely free of all duties, and she directed her trustees to stand possessed of her residuary estate in trust to pay the income thereof to her husband for life and after his death to stand possessed of her residuary trust funds in trust for her son for his own use absolutely. She died on June 20, 1937, and the estate duty then becoming payable (including that attributable to the 10,000*l.* stock) was paid. By virtue of s. 5, sub-s. 2, of the Finance Act, 1894 (2), and s. 14 of the

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(1) [1942] Ch. 335.

(2) Finance Act, 1894, s. 5, sub-s. 2: "If estate duty has "already been paid in respect of "any settled property since the "date of the settlement the estate "duty shall not . . . . be payable "in respect thereof, until the death "of a person who has at the time "of his death or had been at any

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Finance Act, 1914, no estate duty became payable on the death of the husband in respect of the testatrix's residuary estate or any part thereof unless the husband was "during "the continuance of the settlement competent to dispose of "it." By a deed of disclaimer dated February 24, 1938, the husband formally disclaimed the legacy, which thereupon became part of the testatrix's residuary estate. He died on August 31, 1940, and on his death the revenue authorities claimed duty on the 10,000*l.* stock. On a summons taken out by the trustees of the will to have it determined whether, the husband having disclaimed the legacy, estate duty was payable, Farwell J. held that the husband had been "competent to dispose of" the 10,000*l.* stock and had chosen to dispose of it by disclaiming the legacy, and that the duty was payable. The trustees of the will appealed.

J. V. Nesbitt for the trustees. The disclaimer of the legacy operated from the time of the testatrix's death and the actual deed of disclaimer merely evidenced the disclaimer: Davidson's Precedents of Conveyancing, 2nd ed., vol. v., pt. 2, p. 1073. The disclaimer, therefore, made the gift void ab initio: *Townson* v. *Tickell* (1), when Bayley J. said that the gift was nothing more than an offer which might be accepted or refused "and if he (the devisee) refuses, he is in the same position "as if the offer had never been made": see also *Peppercorn* v. *Wayman* (2); *In re Wimperis* (3); and *Mallott* v. *Wilson* (4). There was no effectual gift of the 10,000*l.* stock unless and until it was accepted, and so the husband never was "competent "to dispose" of the stock although he was until he disclaimed

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"time during the continuance of "the settlement competent to "dispose of such property."

Sect. 22, sub-s. 2 (*a*): "A person "shall be deemed competent to "dispose of property if he has such "an estate or interest therein or "such general power as would, if "he were sui juris, enable him to "dispose of the property . . . . and "the expression 'general power' "includes every power enabling "the donee . . . . to appoint or "dispose of property as he thinks "fit, whether exerciseable by instrument inter vivos or by will, "or both . . . ."

Finance Act, 1914, s. 14, restricts the relief from payment of estate duty given by s. 5, sub-s. 2, in the case of any person dying after August 15, 1914, to cases where estate duty has been paid on the death of one of the parties to a marriage so far as respects the payment of estate duty on the death of the other party to the marriage.

(1) (1819) 3 B. & Ald. 31, 36.
(2) (1852) 5 De G. & Sm. 230.
(3) [1914] 1 Ch. 502.
(4) [1903] 2 Ch. 494.

C. A.
1942
PARSONS, *In re.*
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in a position to acquire the right to be "competent to dispose" of it. It follows that by reason of s. 5, sub-s. 2, of the Act of 1894, no liability to estate duty arose on the husband's death in respect of the 10,000*l.* stock. Even if on the true view the husband was "competent to dispose" of the 10,000*l.* stock, he was not so competent "during the continuance of the "settlement." The only settled property was the residuary estate and the stock never became part of that estate until the husband disclaimed. The stock could not become settled property until the disclaimer became operative, that is, until after the husband ceased to be competent to dispose of the property.

J. H. Stamp for the Attorney-General. The husband had power to dispose of the 10,000*l.* stock in any way he liked until he disclaimed the legacy. He was, therefore, "competent "to dispose" of the stock in the ordinary meaning of that phrase and the definition of its meaning in s. 22, sub-s. 2 (*c*), makes that still clearer. It would be strange if this were not so seeing that a mere power enabling a donee to dispose of property suffices under the sub-section. Further, he was "competent to dispose" of the stock during the continuance of a settlement which included the stock. The testatrix by her will settled her residuary estate consisting at her death of an unascertained body of assets. When the legacy of 10,000*l.* stock was disclaimed it became known that the stock had been part of the residue as from the testatrix's death and so was included in the settlement made by her will. Thus, the husband was competent to dispose of stock during the continuance of the settlement which in the result included the stock disclaimed as from the testatrix's death. Were this not so the trustees would be faced with the difficulty that since the stock was brought into settlement by the disclaimer no estate duty was paid and s. 5, sub-s. 2, of the Act of 1894 would have no application. Further, the only person entitled in the result to interest on the stock between the death and the disclaimer was the tenant for life of the residue. The authorities cited have no real bearing. No doubt, a gift is not complete until it is accepted, but in the same way a power to appoint an estate only passes it where it is exercised. Further, a legacy is more than a mere offer and would be better described as conferring a binding option. The legatee has an irrevocable right to accept the legacy.

Nesbitt replied.

LORD GREENE M.R. Two arguments have been advanced by Mr. Nesbitt on behalf of the trustees of the will. The first turns entirely on the words " competent to dispose " in s. 5, sub-s. 2, of the Finance Act, 1894. It is said that the competence of the husband in relation to the 10,000*l.* consols ceased on the disclaimer. No criticism can be made of that. It is also conceded that between the dates of the death of the testatrix and disclaimer some interval of time passed during which the husband had not yet decided to disclaim, and that during that period he was competent to acquire the right to dispose of the consols, but it is said that he never in fact acquired that right because he disclaimed the legacy. The argument then proceeds on the basis that on the true construction of the sub-section a legatee who is competent to acquire the right to his legacy, that is, who is competent to take it if he decides not to disclaim, is not competent to dispose of the subject-matter of the legacy within the meaning of the sub-section.

In my opinion, that argument cannot prevail. The phrase " competent to dispose " is not a phrase of art, and, taken by itself and quite apart from the definition clause in the Act, it conveys to my mind the ability to dispose, including, of course, the ability to make a thing your own. From the moment of the testatrix's death the husband was able to make the legacy his own. In fact, if he had died without doing anything, his executors would have been entitled to the legacy merely because he had not disclaimed it. During the period between the death of the testatrix and the disclaimer he was unquestionably " competent to dispose " within the meaning of those words in the sub-section, which, I think, are wide and, in a sense, popular in meaning.

The matter is set beyond doubt by the definition in s. 22, sub-s. 2 (*a*), of the Finance Act, 1894. It is not an exhaustive definition. It leaves the words " competent to dispose " to bear their ordinary meaning in the English language and merely adds certain types of competence which the legislature thought might be considered not to be included in the natural meaning of the words. So far as is applicable to the present case the definition is : " A person shall be deemed competent "to dispose of property if he has any power or authority "enabling him to appoint or dispose of property as he thinks "fit." That language seems to me clearly to cover the case of a legatee to whom a legacy has been given and who is in a

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position either to take it or to disclaim it as he thinks fit. In the present case the husband was in that position during the interval between the testatrix's death and the disclaimer, and I need scarcely add that the fact that for some purposes a disclaimer makes the gift void ab initio does not mean that during the period to which I have referred the competence must be treated in law as not having existed. The doctrine of the gift being void ab initio has nothing to do with considerations of that kind.

In my opinion, the judgment of the learned judge on that argument was right, but there was a second argument which is not dealt with by the learned judge, although it was mentioned before him. It was that a competence to dispose of the property must be shown to have existed during the continuance of a settlement which comprised the property in question. It was argued that it was only by virtue of the disclaimer that the consols became settled property, and, therefore, that the husband was not competent to dispose of that settled property during the continuance of the settlement, it being one and the same act which brought the property into the settlement and terminated the husband's competence to dispose of it. In my judgment, that argument also fails. The settlement was the will and the property comprised in it was the residue of the testatrix, whatever that might turn out to be. Looking at the situation at the moment after death, it was obviously impossible to say what would be included in the residue. It was impossible at that date to say specifically that this sum of consols would ultimately be included in the residue after the estate was clear and the legatee had made up his mind. Nevertheless, it seems to me that the residue, whatever it might turn out to be, was settled by the will, and the date of that settlement was the day of the death of the testatrix.

In passing, it may be pointed out, as Mr. Stamp pointed out, that if that view be incorrect, and the consols only became settled property after the date of the settlement, that is to say, only became settled property when the disclaimer took place and not on the death, the benefit of the sub-section could not be claimed.

The true position for present purposes is, I think, that the settlement comprised the whole of the estate other than such parts as might in the result be taken out of it, whether for payment of debts or satisfaction of legacies or for any other reason. At the date of the settlement, therefore, namely, the death, that mass of property was the settled property and the husband was in the position that if he chose not to disclaim his legacy the legacy would come to him out of the mass. He was, as Mr. Stamp put it, in a position not unlike that of a person with a binding option. He could take the legacy out of the mass if he thought fit, and of course the court would assume that he had intended to take it apart from a disclaimer or acts from which disclaimer could be inferred.

The result, in my opinion, is that the 10,000*l.* consols was settled property as from the date of the death, and that the husband was competent to dispose of it during the continuance of the settlement. In the result, both points fail and the appeal must be dismissed.

LORD CLAUSON. I find myself in complete agreement on both points with the Master of the Rolls, and, therefore, I do not propose to express the grounds of the judgment in any other words. It is interesting to note, however, that the practical position is perfectly clear. The husband found that his wife had left him absolutely a sum of 10,000*l.* consols. It is obvious that he wanted, while retaining the income of those consols, to let them pass to his son. He did it by disclaiming the legacy, which really was a mere form because the disclaimer left the husband with the benefit of the income for life, under the residuary gift. The practical position is just the same as if he had accepted the legacy and had then assigned it to the trustees of the will on the trusts of the settlement. If that had happened the revenue authorities would obviously have been entitled to the estate duty which they are now claiming. I cannot help saying that I feel some satisfaction that we have not been forced to give the estate a benefit in regard to estate duty purely by reason of the technical considerations attaching to a disclaimer.

DU PARCQ L.J. I agree. If by disposing of a sum I show that I accept an offer made to me which entitles me to dispose of it, it is clear that I am competent to dispose of it. I agree entirely with what has been said by the Master of the Rolls.

Appeal dismissed.

Solicitors: *Vizard, Oldham, Crowder & Cash, for Owston & Co., Leicester; Solicitor of Inland Revenue.* H. C. G.

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July 23, 24, 29, 30; Oct. 26.

TITHE REDEMPTION COMMISSION *v.* COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES.

Ecclesiastical law—Church in Wales—Tithe rentcharge—Vesting in Commissioners of Church Temporalities in Wales—Former vesting in Ecclesiastical Commissioners for England—" Lay impropriator "—Liability to repair chancels—Welsh Church Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *s.* 28, *sub-s.* 1.

On the disestablishment of the Welsh Church certain tithe rentcharges, formerly vested in the Ecclesiastical Commissioners for England, became vested in the Commissioners of Church Temporalities in Wales, being transferable to the University of Wales by virtue of the provisions of the Welsh Church Acts, 1914 and 1919. A summons was taken out by the Tithe Redemption Commission to determine whether these tithe rentcharges were, immediately before October 2, 1936 (the date under the Tithe Act, 1936, for the extinguishment of tithe rentcharge), vested in the Welsh Commissioners subject to or freed from the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in the Welsh Commissioners:—

Held, that the Ecclesiastical Commissioners for England were not lay impropriators within s. 28, sub-s. 1, of the Welsh Church Act, 1914; that, in consequence, the Welsh Commissioners, who, as statutory transferees, derived their character from the Ecclesiastical Commissioners, were not lay impropriators within that subsection; and that, therefore, the tithe rentcharges were, immediately before October, 1936, vested in the Welsh Commissioners, freed from that liability.

Commissioners of Church Temporalities in Wales v. *Representative Body of the Church in Wales* [1940] Ch. 607 applied.

ADJOURNED summons.

At the date of the disestablishment of the Welsh Church certain tithe rentcharges (forming part of the Welsh ecclesiastical property and formerly vested in the Ecclesiastical Commissioners for England), which were not appropriated to the use of any parochial benefices, became vested in the Commissioners of Church Temporalities in Wales (the Welsh Commissioners) by the combined operation of the Welsh Church Acts, 1914 and 1919, and orders made thereunder. These tithe rentcharges would, if the Tithe Act, 1936, had not been passed, have been transferable to the University of Wales under s. 8, sub-s. 1 (*e*), of the Welsh Church Act, 1914. This summons was taken out by the Tithe Redemption

Commission—the Welsh Commissioners, the Representative Body of the Church in Wales, Plymouth Estates, Ld. (who, at the date of the coming into operation of the Welsh Church Acts, owned a portion of tithe in the parish of Llantwit, the balance being vested in the Ecclesiastical Commissioners), and the University of Wales being defendants—to determine whether the tithe rentcharges became under the said Acts and were immediately before October 2, 1936 (the date under the Tithe Act, 1936, for the extinguishment of tithe rentcharge), vested in the Welsh Commissioners subject to the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in the Welsh Commissioners or freed from that liability.

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Waite for the plaintiffs.

Rewcastle K.C. and *Beebee* for the Welsh Commissioners. The Ecclesiastical Commissioners are not lay impropriators within s. 28, sub-s. 1, of the Welsh Church Act, 1914 (1), and that also excludes the Welsh Commissioners, who take their character from the Ecclesiastical Commissioners. It follows that the tithe rentcharges in question were vested in the Welsh Commissioners freed from liability to repair. "Lay "impropriator" in the sub-section means one who is outside the provisions of the Act: per MacKinnon L.J. in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (2), but the Ecclesiastical Commissioners are clearly not outside the Act. The phrase "lay "impropriator" cannot have one meaning as regards laicized property which goes to the county councils as in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (2), and a different meaning as regards laicized property which goes to the University of Wales. The true meaning in both cases is "persons who are outside "the Act altogether," of which class Plymouth Estates, Ld., are representative in this case. These "lay impropriators" are only referred to in the Act to make it clear that nothing in the Act affects them. They are, therefore, essentially different from the Ecclesiastical Commissioners. They are mere investors, applying the proceeds of their property to any purpose which they choose, whereas the Ecclesiastical Commissioners perform a duty prescribed by the Act and have no place in any saving section. Sect. 28 is purely a saving section. That is the only interpretation which coincides with the purpose and framework of the Act. The Ecclesiastical Commissioners are a lay corporation, but not lay persons and certainly not lay impropriators.

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(1) By Welsh Church Act, 1914, s. 28, sub-s. 1: "Nothing in this "Act shall affect any liability "to pay tithe rentcharge, or the "liability of any lay impropriator "of any tithe rentcharge to repair "any ecclesiastical building, but "a county council shall not, by "reason of being entitled to or "receiving any tithe rentcharge "under this Act, be liable for the "repair of any ecclesiastical "building."

(2) [1940] Ch. 607.

Beebee for the University of Wales.

Roxburgh K.C., *J. H. Stamp* and *Gwyn Rees* for the Representative Body of the Church in Wales. The Ecclesiastical Commissioners were lay impropriators at the date of the disestablishment. "Lay impropriator" in s. 28, sub-s. 1, means the owner of a rectory or part of a rectory or rectorial property who is not an ecclesiastical or spiritual person. Tithe rentcharge once formed part of the rectorial property. These rentcharges were vested in the Ecclesiastical Commissioners at the time of the disestablishment and the Ecclesiastical Commissioners are not a spiritual body. The word "lay" is descriptive of the owner of the property and has nothing to do with the objects to which he applies the proceeds of the property or the purposes for which he owns the property. In Blackstone's Commentaries, 4th ed., vol. i., p. 448, it is stated that: "Ecclesiastical corporations are "where the members that compose it [sic] are entirely spiritual "persons." Some of the Ecclesiastical Commissioners are lay persons. The liability which falls on the Welsh Commissioners, as statutory transferees from the Ecclesiastical Commissioners, is the same as that of any other transferee from a lay impropriator. Alternatively, if the court takes the view that the effect of *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (1) is that the Welsh Commissioners are not lay impropriators, the University of Wales, which is not a body created by the Act, is a lay impropriator. Finally, looking broadly at s. 8, it will be found that the Act deals with two species of rentcharge. One is that which belongs to a parochial incumbent and its destination is the county council. The other is that which is deemed to be Welsh ecclesiastical property and its destination is the University of Wales. Sect. 28, sub-s. 1, has given an express exemption from liability to repair to

(1) [1940] Ch. 607.

the county council, but none to the University. It would, therefore, be astonishing, if the county council and the University were in exactly the same position. [*Wickhambrook Parochial Church Council* v. *Croxford* (1) was referred to.]

Wilfrid Hunt for Plymouth Estates, Ld. At the date of the passing of the Welsh Church Act, 1914, Plymouth Estates, Ld., and the Ecclesiastical Commissioners were, on the authority of *Wickhambrook Parochial Church Council* v. *Croxford* (1), severally liable to repair the chancel of Llantwit parish church. It was recognized by the Court of Appeal in that case that there was a right of contribution between the two owners, but, if the argument on behalf of the Welsh Commissioners in the present case is correct, the effect of the Act is to take away from Plymouth Estates, Ld., that valuable right of contribution without giving any compensation. The court will strain to avoid that construction: see *Att.-Gen.* v. *Horner* (2).

Rewcastle K.C. replied.

Cur. adv. vult.

1942. Oct. 26. BENNETT J. This is not the first time that the construction of the Act of 1914 has been considered by the court. In 1940 the court was asked in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (3), to decide whether the Welsh Commissioners were liable to repair the chancel of the parish church of Llanglydwen, in the county of Carmarthen. The point was raised by a summons issued to test the liability of the Welsh Commissioners to repair chancels in cases where the Act of 1914 had vested in them tithe rentcharges which, on March 31, 1920, were in spiritual ownership. The facts of that case were that, before March 31, 1920, the whole of the tithe rentcharges issuing out of lands in that parish belonged to the rector of the parish as parochial incumbent, and he was liable, under ecclesiastical law, to repair the chancel of the parish church. These tithe rentcharges were vested in the Welsh Commissioners by s. 4, sub-s. 1 (*b*), of the Act of 1914 and were transferable by them to the Carmarthen county council. The question was whether the Welsh Commissioners were lay impropriators of these tithe rentcharges within the meaning of s. 28 and so liable for the repair of the parish church. The Court of Appeal decided that they were not liable.

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(1) [1935] 2 K. B. 417.
(2) (1884) 14 Q. B. D. 245, 257.
(3) [1940] Ch. 607.

The main controversy before me was whether this decision covered the present case. Counsel for the Representative Body and Mr. Hunt for Plymouth Estates, Ld., argued that the decision in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (1) did not cover this case for the reason that that decision was concerned with a case in which the tithe rentcharges, which s. 4 of the Act of 1914 vested in the Welsh Commissioners, were, at the date of vesting, in spiritual ownership, whereas in the present case the tithe rentcharges, which the section vested in the Welsh Commissioners, were, at the date of vesting, in the ownership of lay impropriators, namely, the Ecclesiastical Commissioners. Their argument was that, if, before March 31, 1920, the Ecclesiastical Commissioners were lay impropriators of tithe rentcharges issuing out of lands in Wales, they were, as owners of such tithe rentcharges, liable to repair the chancels of the churches of the parishes in which the lands out of which the tithe issued were situate and that that liability was preserved by s. 28 of the Act of 1914 and ran with the tithe rentcharge under sub-s. 2 of that section. There was no reason, so it was argued, for drawing any distinction between the Ecclesiastical Commissioners, as lay impropriators of such rentcharges, and any other lay impropriators of tithe rentcharges issuing out of lands in Wales, as, for example, Plymouth Estates, Ld. The argument was that nothing to the contrary was said in or decided by *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (1). Mr. Rewcastle, while conceding that the Ecclesiastical Commissioners were a lay corporation, submitted that they were not lay impropriators within the meaning of s. 28 of the Act of 1914. His argument was that the decision of the Court of Appeal in the former case was based on an interpretation of the words " lay impropriator " which excluded the Ecclesiastical Commissioners in respect of tithe rentcharges ascertained to be Welsh ecclesiastical property. The question does turn, I think, on the meaning of the words " lay impropriator " in s. 28. Indeed, I think all parties share the view that the interpretation of those words in that section is the cardinal point in the case for,

(1) [1940] Ch. 607, 627.

having regard to the provisions of s. 3, putting an end to the ecclesiastical law of the Church in Wales, the ownership of the tithe rentcharges in question could give rise to no liability to repair unless the liability arising out of their ownership immediately before March 31, 1920, is preserved by s. 28, sub-s. 1.

I have come to the conclusion that Mr. Rewcastle's argument is well-founded, and that, in deciding *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (1), the Court of Appeal did attribute to the words "lay impropriator" in s. 28, sub-s. 1, a meaning which excludes the Ecclesiastical Commissioners in respect of tithe rentcharges ascertained to be Welsh ecclesiastical property. The meaning of these words in s. 28, sub-s. 1, was clearly stated in the judgment of MacKinnon L.J. where he says that the true view is that "lay impropriator" in this section "means one who is a lay impropriator of a tithe rentcharge "at the date of the Act and outside its provisions altogether." This attribution excludes the Ecclesiastical Commissioners in respect of tithe rentcharges ascertained to be Welsh ecclesiastical property, for, although in respect of such tithe rentcharges I have no doubt but that they would properly be described as lay impropriators, they were not outside the provisions of the Act.

On behalf of Plymouth Estates, Ld., Mr. Hunt advanced an argument which was based on the assumption that, if the Welsh Commissioners were freed from all liability to repair the chancel of the parish church of Llantwit Major, his clients would be alone liable to repair that chancel without the right of contribution which they had before March 31, 1920. If that assumption is right, no doubt Plymouth Estates, Ld., are adversely affected by the Act. The question whether or not Mr. Hunt was right in making that assumption was not discussed before me and I am not satisfied that he was right, but, be that as it may, if I am right in concluding that the judgment of the Court of Appeal in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (1) was based on the attribution of a particular meaning to the words "lay impropriator" in s. 28, sub-s. 1, I am obliged to hold, notwithstanding hardship, that the Welsh Commissioners were freed from liability to repair arising out of the ownership of these tithe rentcharges. I have, therefore,

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come to the conclusion that, on the true construction of the Welsh Church Acts, 1914 and 1919, the tithe rentcharges, which were formerly vested in the Ecclesiastical Commissioners and which, if the Tithe Act, 1936, had not been passed, would have been transferable to the University of Wales, were immediately before October 2, 1936, vested in the Welsh Commissioners freed from liability for the repair of chancels of churches to which the ownership thereof gave rise.

Solicitors: *A. D. Stocks; R. Primrose; Milles, Jennings White & Foster; Nicholl Manisty & Co.*

J. L. D.

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Oct. 13, 14; *Nov.* 5, 16.

In re GOURJU'S WILL TRUSTS.

STARLING *v.* CUSTODIAN OF ENEMY PROPERTY.

Trust—Protective trusts—Forfeiture—Income of residuary estate—Principal beneficiary deprived of right to receive the same—Residence in France—Emergency legislation—Trading with the Enemy—Payment of income to Custodian of Enemy Property—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), s. 33, *sub-s.* 1—*Trading with the Enemy Act,* 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 7, *sub-s.* 1—*Trading with the Enemy (Custodian) Order,* 1939 (*St. R. & O.,* 1939, *No.* 1198), *para.* 1 (*ii.*) (*i.*).

By his will, made in 1936, a testator of French origin, who had been naturalized in England, directed the trustees thereof to hold the income of his residuary estate upon protective trusts for the benefit of his widow during her life. By s. 33, sub-s. 1 (i.), of the Trustee Act, 1925, the widow became entitled to receive the income until any event happened whereby, if the income were payable during the trust period to her absolutely, she would be deprived of the right to receive the same or any part thereof. The testator died in 1936. At all material times the widow was resident in an area in France in relation to which the provisions of the Trading with the Enemy Act, 1939, and the orders made thereunder had been applied by the Trading with the Enemy (Specified Areas) Order, 1940:—

Held, that, on the making of the Trading with the Enemy (Specified Areas) Order, 1940, an event had happened whereby the widow had been deprived of the right to receive the income of the residuary estate so that that income was thenceforth held on the discretionary trusts defined by s. 33, sub-s. 1 (ii.), of the Trustee Act, 1925, for the benefit of the widow or other persons, and was not payable to the Custodian of Enemy Property.

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At the date of the making of the order the bankers of the trustees had received income amounting to 106*l.*, which they had been instructed to remit to the widow, but in the circumstances they had carried it to a suspense account. Since that event the trustees had received income amounting to 2929*l.*

Held, (1.) that the 106*l.* was payable to the Custodian of Enemy Property; (2.) that the Apportionment Act, 1870, did not apply to the 2929*l.*, which was wholly held on the discretionary trusts above defined.

In re Sampson [1896] 1 Ch. 630; *In re Greenwood* [1901] 1 Ch. 887; *In re Jenkins* [1915] 1 Ch. 46 applied.

Held, further, that, the discretionary trust having arisen, the trustees had no power to retain all or any part of the income and to postpone its application for so long as they thought fit, but were bound to expend the income as and when they received it for the purposes indicated in s. 33, sub-s. 1 (ii.), of the Trustee Act, 1925.

In re Peel [1936] Ch. 161 applied.

ADJOURNED summons.

By his will, dated December 10, 1936, the testator, Philippe Ernest Gourju, who was of French origin but had been naturalized in Great Britain, directed his trustees during the life of his widow, the defendant, Marie Pauline Gourju, to hold the income of his residuary estate upon protective trusts for her benefit, and subject thereto upon trusts for the benefit of his children and remoter issue, subsequently modified by a family arrangement. The testator died on December 14, 1936, leaving him surviving his widow and two sons, one of whom had since died leaving two infant children. Marie Pauline Gourju at all material times was resident at Nice in that part of the Republic of France which was then "unoccupied" by Germany. She was, nevertheless, by virtue of the Trading with the Enemy (Specified Areas) Order, 1940, to be regarded as an "enemy" for the purposes of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939 (1). The income of the residuary estate was paid to her down to the end of June, 1940, but after that date income amounting to 3035*l.*, which had been collected, remained in the hands of the trustees. The question raised by the

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(1) By Trustee Act, 1925, s. 33, sub-s. 1: "Where any income . . . . is directed to be held on protective trusts for the benefit of any person (in this section called 'the principal beneficiary') for the period of his life or any less period, then, during that period (in this section called 'the trust period') the said income shall . . . . be held on the following trusts, namely:—(i.) Upon trust for the principal beneficiary during the trust period . . . . or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal

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"beneficiary absolutely during "that period, he would be deprived of the right to receive "the same or any part thereof, "in any of which cases, as well as "on the termination of the trust "period, whichever first happens, "this trust of the said income "shall fail or determine; (ii.) If "the trust aforesaid fails or "determines during the subsistence of the trust period, then "during the residue of that period, "the said income shall be held "upon trust for the application "thereof for the maintenance or "support, or otherwise for the "benefit, of all or any one or "more exclusively of the other "or others of the following persons (that is to say)—(*a*) the "principal beneficiary and his or "her wife or husband, if any, and "his or her children or more "remote issue if any . . . . as the "trustees in their absolute discretion, without being liable to "account for the exercise of such "discretion, think fit."

By Trading with the Enemy Act, 1939, s. 7, sub-s. 1: "With a "view to preventing the payment "of money to enemies and of "preserving enemy property in "contemplation of arrangements "to be made at the conclusion of "peace, the Board of Trade may "appoint custodians of enemy "property for England, Scotland "and Northern Ireland respectively, and may by order—(*a*) "require the payment to the "prescribed custodian of money "which would, but for the existence of a state of war, be "payable to or for the benefit of a "person who is an enemy, or "which would, but for the provisions of s. 4 or s. 5 of this "Act, be payable to any other "person; (*b*) vest in the prescribed custodian such enemy "property as may be prescribed, "or provide for, and regulate, "the vesting in that custodian "of such enemy property as may "be prescribed."

By Trading with the Enemy (Custodian) Order, 1939: "(1.) (i.) "Any money which would, but for "the existence of a state of war, "be payable to or for the benefit of "a person who is an enemy, and "any money which is to be deemed "for the purposes of the Act to "be money which would, but for "the existence of a state of war, "be so payable, shall be paid to "the Custodian. (ii.) Without "prejudice to the generality of "the foregoing paragraph, there "shall be paid to the Custodian in "particular any money which "would, but for the existence of a "state of war, be payable to or "for the benefit of a person who is "an enemy, by way of: . . . . "(*i.*) payment arising under any "trust will or settlement."

By Trading with the Enemy (Specified Areas) Order, 1940, St. R. & O. 1940, No. 1219: "(1.) The provisions of the Trading with the Enemy Act, 1939, "shall apply in relation to each "of the areas specified in the "schedule hereto as they apply "in relation to enemy territory."

By sched.: "Those parts of "Metropolitan France which are "not included in the area occupied "by Germany in accordance with "the terms of the Franco-German "Armistice Convention of June "22, 1940."

summons was whether, having regard to the facts stated and to the Trading with the Enemy Act, 1939, and the orders made thereunder, the trust for the payment of the income of the testator's residuary estate to Marie Pauline Gourju had been determined under s. 33 of the Trustee Act, 1925, and the discretionary trust therein referred to had arisen and was in operation, or whether the said income was payable to the Custodian of Enemy Property during the remainder of the life of Marie Pauline Gourju, or for some and what other period, and, further, if such a discretionary trust had arisen, on what date it came into operation, and whether the Apportionment Act, 1870, applied to the income accrued up to that date.

Sir David Maxwell Fyfe S.-G. and *Danckwerts* for the Custodian of Enemy Property. The income of the testator's residuary estate is payable to the Custodian because there has been no forfeiture of Madame Gourju's protected life interest within s. 33, sub-s. 1 (i.), of the Trustee Act, 1925. The words "deprived of the right to receive the same" in that sub-section refer, not to a temporary, but only to a permanent deprivation: see *In re Hallenstein* (1); *In re Levinstein* (2). Here Madame Gourju will only be deprived of the income temporarily, namely, for the period of the war. It is open for the court to hold that the holding by the Custodian in this case is not a determination of Madame Gourju's beneficial interest, but is only an action taken to preserve her property while she is in enemy-controlled territory. Nothing in the Act of 1939 or in the orders made under it deprives her of her right to receive the income. They merely prevent that right being exercised. Apart from statute, the common law deprives her for the time of the right to receive the income. The provisions of Trading with the Enemy (Custodian) Order, 1939, prevent the provisions in s. 33, sub-s. 1 (i.), of the Trustee Act, 1925, coming into effect. The order has statutory effect which no words in any will can override. It has been held that a forfeiture is not created by the appointment of a receiver in lunacy: *In re Marshall* (3); nor by an order of the court under s. 57 of the Trustee Act, 1925, giving power to trustees to raise capital moneys for the benefit of life tenants: *In re Mair* (4); nor by a garnishee order served on trustees by a

(1) [1922] 1 Ch. 355.
(2) [1921] 2 Ch. 251.
(3) [1920] 1 Ch. 284.
(4) [1935] Ch. 562.

judgment creditor of the cestui que trust: *In re Greenwood* (1).

[They referred to *In re Münster* (2); *In re Chamberlain's Settlement* (3); *In re Biedermann* (4); *In re Sartoris's Estate* (5); *In re Baring's Settlement Trusts* (6).]

Idelson, for Madame Gourju, also contended that there had been no forfeiture, and referred to Underhill on Trusts, 9th ed., p. 72.

Raymond Jennings for the defendant, Charles Gourju. There has been a forfeiture of the life interest under s. 33, sub-s. 1 (i.), of the Trustee Act, 1925, and the discretionary trust arises. Any event which has the effect of depriving the beneficiary of the enjoyment of the right to receive the income creates a forfeiture: *In re Baker* (7). The decision in *In re Münster* (2) was under a different statute, but the words used were almost exactly the same as in the present one. It is not the war, but the language of the testator's will which prevents Madame Gourju from receiving her income at the present time.

Roxburgh K.C. and *Pascoe Hayward* for infant defendants, children of Robert Gourju. A forfeiture took place when the Trading with the Enemy (Specified Areas) Order, 1940, was made. Madame Gourju's beneficial interest was then extinguished for ever, and it cannot be revived when peace is declared. The matter has to be tested at the moment when the trustee has money in his hands available for distribution. If this money cannot be paid to Madame Gourju she is "deprived "of the right to receive the same" from the trustee within s. 33, sub-s. 1 (i.), of the Trustee Act, 1925, and there is a forfeiture. The Trading with the Enemy Act, 1939, and the orders made under it can only operate on her beneficial interest. They can have no operation if, under the Trustee Act, 1925, she has now no beneficial interest. Therefore the income is not payable to the Custodian. Even if Madame Gourju were not permanently deprived of her interest, the position would be the same. In *In re Sartoris's Estate* (5) it was not certain that the debtor would be permanently deprived of his income: *Metcalfe* v. *Metcalfe* (8). Possibly, the legislature intended a discretionary trust to take effect for the time being. At the end of the war the rights of the parties will have to be determined by legislation. *In re Greenwood* (1) and *In re*

(1) [1901] 1 Ch. 887.
(2) [1920] 1 Ch. 268.
(3) [1921] 2 Ch. 533.
(4) [1922] 2 Ch. 771.
(5) [1892] 1 Ch. 11.
(6) [1940] Ch. 737.
(7) [1904] 1 Ch. 157.
(8) [1891] 3 Ch. 1.

Marshall (1) are distinguishable. A garnishee order does not operate as a forfeiture because it takes effect only after the income has accrued due: *In re Forder* (2); and in *In re Marshall* (1) the receiver was the statutory agent of the lunatic to receive the income on his behalf.

Cur. adv. vult.

1942. Nov. 5. SIMONDS J. The question which I have to determine is whether the coming into force of the Trading with the Enemy Act, 1939, and the orders made thereunder is the happening of an event whereby, if the income of the testator's residuary estate were payable to Madame Gourju absolutely, she would be deprived of the right to receive the same or any part thereof.

It may be observed that this legislation differs from that which was passed during the last war in that under that legislation money payable under a trust, will or settlement was not payable to the Custodian of Enemy Property except through the operation of a vesting order: see *In re Hallenstein* (3). In other respects the present legislation appears to follow closely in the footsteps of its predecessor. In particular, although the Solicitor-General has forcibly argued that here, too, a different result flows from the slightly different wording of the relevant Acts, I cannot regard the character in which the Custodian receives money paid to him under the present Act and order as differing from that in which he received money under the earlier Act. He does not receive such money as agent for the enemy. He has certain limited powers of dealing with it, but, apart from that, the beneficial ownership is to be regarded as in statutory suspense: see *In re Münster* (4).

The position, then, being (*a*) that as each instalment of the residuary trust income becomes available in the hands of the trustees they would, but for the operation of the Act and order, pay it to Madame Gourju, but (*b*) that in consequence of that operation they must pay it to the Custodian, and (*c*) that the Custodian will not hold it as her agent, I cannot avoid the conclusion that an event has happened whereby Madame Gourju has been deprived of the right to receive the income or some part thereof. From this conclusion it follows

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(1) [1920] 1 Ch. 284.
(2) [1927] 2 Ch. 291, 297.
(3) [1922] 1 Ch. 355.
(4) [1920] 1 Ch. 268.

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that her determinable interest has been determined, and that the discretionary trust has been erected in its place.

I do not think it necessary to examine the many cases in which words similar to those in the statutory forfeiture clause provided by s. 25 of the Trustee Act, 1925, have been considered. This has recently been done by Morton J. in *In re Baring* (1), and I am content to adopt what I understand to be the principle of his decision and apply it here, namely, that such a clause contemplates a continuous benefit to the beneficiaries—that either the principal beneficiary should enjoy the income or the persons entitled under the discretionary trust should do so. That trust is not satisfied if the income is, against the wish of the principal beneficiary, paid to the Custodian and the beneficial ownership of it remains in statutory suspense. It was urged on me by counsel for Madame Gourju that the result of such a decision is a forfeiture by reason of an event which can never have been contemplated by the testator, an event, moreover, of a wholly different character from any event fairly within his contemplation. With that I cannot but agree, but the words of the clause are too strong for me, and I can only express the earnest hope that in the welter of legislation that peace will bring, the hard case will not be forgotten of a beneficiary who, like Madame Gourju, suffers an undeserved forfeiture of her income. I should add, lest it be thought that I have ignored a contention put forward on behalf of the Custodian, that I cannot regard s. 7, sub-s. 4, of the Act as having the effect of overriding the forfeiture clause which is by virtue of the Trustee Act, 1925, written into the testator's will. The words that he uses "protective trusts for the benefit of my wife," have the meaning and effect assigned to them by the Trustee Act, 1925, but they operate not because anything is enacted in any Act of Parliament, but because he has used them in his will.

Finally, it was contended that the authority of *In re Greenwood* (2) precludes me from holding that there has been a forfeiture. That case decided that where a judgment creditor of A. served his trustees, who had accrued income available for payment to him in their hands, with a garnishee order, this did not operate as a forfeiture of A.'s life interest, but this decision rests on the ground that a creditor can only attach a debt after it has become due and that at a certain stage

(1) [1940] Ch. 737.

(2) [1901] 1 Ch. 887.

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the relation of trustee and cestui que trust is altered to that of debtor and creditor. It is applicable where, and only where, the event which is alleged to cause a forfeiture affects nothing more than money in the hands of a third party who can be regarded as a debtor to the beneficiary. To give a wider application to the decision would be inconsistent with a long line of authority which is binding on me.

Nov. 16. The summons also raised the following questions (1.) whether the Apportionment Act, 1870, ought to be applied to the income accrued up to July 10, 1940, the date when the Trading with the Enemy (Specified Areas) Order, 1940, was made; (2.) whether any income in hand ought to be paid to the Custodian; and (3.) whether, the discretionary trust having arisen, the trustees had power to retain all or any part of the income and postpone the application thereof for so long as they thought fit, or whether they were bound to expend in each year the income of that year for the purposes indicated in s. 33, sub-s. 1 (ii.), of the Trustee Act, 1925. On July 10, 1940, 106*l.* was standing to the credit of the trustees at their bank, being income which the bank had been instructed to remit to Madame Gourju and which they had since carried to a suspense account. After July 10, 1940, the trustees had received 2929*l.* income of the residuary estate. After further argument on these questions, the following judgment was delivered.

SIMONDS J. With regard to the smaller sum of 106*l.*, in view of the decisions in *In re Sampson* (1), *In re Greenwood* (2), and *In re Jenkins* (3), I must hold that there has been no forfeiture and that this sum is payable to the Custodian. In my judgment, it is otherwise with regard to the larger sum which, by virtue of the provisions of the Apportionment Act, 1870, is to be regarded as accruing during the period ending on July 10, 1940. I do not think it is open to me to come to any independent conclusion with regard to that sum. The authorities to which I have referred, in my view, bind me to hold that with regard to that sum there has been a forfeiture.

In *In re Sampson* (1), Stirling J. had to consider these somewhat unusual words: "upon trust to pay to my said son "so much of the same annuity and income as would not,

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(1) [1896] 1 Ch. 630.

(2) [1901] 1 Ch. 887.

(3) [1915] 1 Ch. 46.

"although the same were payable to him, be by his act or "default or by operation or process of law so disposed of as "to prevent his personal enjoyment thereof, and to apply so "much of the same annuity and income as would, if the same "were payable to my said son, be disposed of as last aforesaid "for the benefit of his wife and children. . . . ." Stirling J. said: "I think that the epoch at which the destination of "any instalment of income is to be determined is the moment "when that instalment either accrues due or is in the hands "of the trustees ready for application in accordance with the "trusts of the will." I am not quite clear where the line of distinction is between an instalment accruing due and being in the hands of the trustees, but it is clear that by the words "accrues due" he does not mean "accrues due artificially "by reason of the provisions of the Apportionment Act." It must be something which has accrued due in the sense of having already become payable or being in the hands of the trustees, which, of course, involves that it has already become due and been paid.

In re Greenwood (1) came before Farwell J., and there the words which the learned judge had to construe were almost exactly the same as those which are incorporated in this will by virtue of s. 33 of the Trustee Act, 1925. The trust was to pay the income to A. for life "or until he attempts to alien, "charge or anticipate the same . . . . or until any other "event happens whereby, if the same were payable to him "absolutely for his life, he would be deprived of the right "to receive the same or any part thereof." A judgment creditor had served a garnishee order on the trustees who had accrued income in their hands. Farwell J. said: "In "my opinion, the true meaning of these words—and they are "the only words really material to the present case—' or until "' any other event happens whereby, if the same were payable "' to him absolutely for his life, he would be deprived of the "' right to receive the same or any part thereof,' is ' if he were "' deprived of the right to receive the same or any part thereof "' on the day it becomes due.' That seems to me not only "a fair and reasonable construction of the words of this "particular will but also to be in accordance with what I "think are really the necessary requirements of the law to "make it a valid gift."

Finally, in *In re Jenkins* (2), where for the first time the

(1) [1901] 1 Ch. 887.

(2) [1915] 1 Ch. 46.

applicability of the Apportionment Act was argued, Sargant J. had to consider a direction that income should be payable to the son " so long as he shall not attempt to assign or charge "the same." There the argument was that the Apportionment Act applied so that he was, notwithstanding his attempt to assign or charge, entitled to that part of the income which, by virtue of the Apportionment Act, was to have been deemed to accrue prior to that event. The learned judge, after referring to *In re Sampson* (1) said : " It seems to me impossible "to say that the sum of 254*l.* 6*s.* 2*d.*, representing the "apportioned part of the income down to the date of the "mortgage, was or represented any instalment of income "which had become due or was ready in the hands of the "trustees." He is there clearly echoing the words of Stirling J. in *In re Sampson* (1) : " The very careful language "of this clause seems to me to be directed to prevent income "being payable to the beneficiary after he has attempted to "assign or charge it, and although the words are not sufficient, "as was decided in *In re Sampson* (1), to prevent his receiving "income which was payable and in the hands of the trustees, "or income which had actually accrued due, yet it is a very "different question when you have to consider whether the "trustees are to look to each instalment of income as it becomes "due and to consider what are the different periods during "which the respective parts of the instalment have been "accruing. The effect of the clause, I think, is to prevent "the destination of the income being finally determined until "the time when it has actually accrued due, or, in other words, "become payable, and to direct the trustees, when dealing "with the income, to fix their attention upon the moment "of time when the instalment of income has either reached "their hands or become payable. I do not think that an "instalment or a sum which, if the Apportionment Act had "been applied, would have been ultimately payable to the "tenant for life is an instalment or a payment of income to "which the terms of this clause apply." Applying what the learned judge said in that case I must hold that the apportioned part of the income up to the date when the order came into force is payable under the discretionary trusts which arose on the termination of the protective interest given to Madame Gourju.

I would only add that counsel for Madame Gourju has addressed to me an eloquent appeal to some equity which has been fortified by arguments drawn from the many hard cases to which a forfeiture clause might conceivably apply. I repeat, as I said in my former judgment, that I see the force of that argument. I can well believe that cases arise to which the testator never contemplated the forfeiture clause would apply, but the words of the will incorporating the language of the Act are too strong for me. I must, in construing the words that the testator has used, give to them their ordinary meaning, and I cannot, however much I would like to, make exceptions to provide for hard cases. That is a matter for which the legislature must, if it thinks fit, provide.

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(1) [1896] 1 Ch. 630.

Another question raised on this summons involves the construction of s. 33, sub-s. 1 (ii.), of the Trustee Act, 1925, the question being whether, the discretionary trust having arisen, under the terms of that section the trustees may retain all or any part of the income, if they think proper, and postpone the application thereof for so long as they think fit, or, alternatively, whether they are bound to expend in each year the income of that year for the purposes indicated in the sub-section. The language of the sub-section appears to be clear. The obligation is to apply the income " for the "maintenance or support or otherwise for the benefit of" all or any of the persons indicated. Following the decision of Eve J. in *In re Peel* (1), I come to the conclusion that the obligation of the trustees is to apply the trust income as and when they receive it for the purposes indicated in the sub-section, with, of course, such necessary limitations on absolute obligation as the practical necessities of the case demand. Putting it in a negative way, they are not entitled, regardless of the needs of the beneficiaries, to retain in their hands the income of the trust estate.

Solicitors: *Gilbert Samuel & Co.; Solicitor, Board of Trade; Daphnes.*

(1) [1936] Ch. 161.

H. L. L.

In re BRADBERRY.

NATIONAL PROVINCIAL BANK, LIMITED v. BRADBERRY.

In re FRY.

TASKER v. GULLIFORD.

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1941
Nov. 12, 13;

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Jan. 15;
June 3;
July 30;
Nov. 3.

Administration—Annuity—Valuation—Insufficiency of estate—Death of annuitant.

Where the question of the valuation of annuities comes before the court owing to the insufficiency of the estate and an annuitant has died since the testator's death, the facts as they stand at the date of the order directing the valuation are to be taken into consideration in determining the value of the annuities.

An intention on the part of executors to administer the estate on a basis which is correct at the time of their decision is not sufficient to determine the position of annuitants under the will. Rule in *Todd* v. *Bielby* (1859) 27 Beav. 353, discussed.

ADJOURNED SUMMONS.

In re BRADBERRY.

By her will dated August 19, 1931, the testatrix, Ellen Bradberry, gave legacies to certain legatees and she also gave to Eliza Bradberry, Clara Jones and William Edwards life annuities beginning at the death of the testatrix and payable out of a fund sufficient by its income to answer them and to be appropriated by her executors and trustees, National Provincial Bank, Ld. She directed that if, at the date of appropriation, the income could not answer the annuities then payable, no annuitant should have a claim against, or right to resort to, any other part of her estate for his or her annuity, and she gave her residue to four residuary legatees. The testatrix died on July 27, 1939. Her estate was not enough to pay the legacies and also to provide income to pay the annuities, but it was enough to pay the legacies and the capitalized values of the annuities. On July 13, 1940, Clara Jones died, and the estate then became able to provide the fund to meet the remaining annuities. By the end of that month the annuitants (including Clara Jones, before she died) and (not knowing of Clara Jones' death) all the residuary legatees had consented to the annuitants' accepting the

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capitalized values of their annuities, which the executors of the testatrix had been advised could be done without going to the court. On learning of Clara Jones' death, however, the residuary legatees withdrew their consent. On May 4, 1941, William Edwards died. The bank was prepared to pay to the executors of Clara Jones and William Edwards the values of their annuities capitalized at the date of the death of the testatrix according to the government tables. The residuary legatees contended that these executors were entitled to receive only sums which were equal to the amount of the annuities payable during the periods between the death of the testatrix and the deaths of the annuitants. Were that contention correct, the bank, after providing for those sums and the legacies in full and the duty on them, would have been able to set aside a fund sufficient by its income to pay Eliza Bradberry's annuity in full. The residuary legatees contended that the bank ought to follow that course and not to pay to Eliza Bradberry the capitalized value of her annuity. This summons asked, in substance, how the annuities ought to be valued or otherwise dealt with.

Pascoe Hayward for the bank.

Fawell for Eliza Bradberry. The estate having been actuarially insolvent, Eliza Bradberry had a vested right to be paid the actual valuation of her annuity: *In re Brouncker* (1). That right is independent of any order being made and is the foundation of the order where one is made: *In re Ellis* (2); *In re Cox* (3). The trustees having decided to distribute on the footing of an actual valuation, Eliza Bradberry's right to be paid the actual valuation is indefeasible: *In re Ross* (4). Although the right to payment of the actuarial value is vested, the date of the valuation remains open until it is determined either by the trustees in the exercise of their discretion or by the court—on the surrender by the trustees of their discretion—that the principle of valuation applies. Where the trustees themselves exercise their discretion, as in the present case, the date of valuation is that of the death of the testator, or, alternatively, the date of their determination.

Beebee for the executors of Clara Jones. It cannot be successfully contended that Clara Jones' right to the value of her annuity capitalized as at the date of the death of the testatrix ended because she died before it was paid to her. She had accepted the value so capitalized, and it ought now to be paid to her executors.

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(1) [1938] W. N. 147.

(2) [1935] Ch. 193, 199.

(3) [1938] Ch. 556, 565.

(4) [1900] 1 Ch. 162.

Dare for the executor of William Edwards. William Edwards' estate ought to receive the value of his annuity capitalized as at the date of the death of the testatrix. That order should be made, and what has happened between the date of the death and the date when the matter comes before the court is immaterial. [He referred to *In re Robbins* (1); *In re Metcalf* (2)]. Where the estate is deficient, the duty of the executors is to value annuities as at the date of the death of the testator and to pay to the annuitants the capitalized values, not to pay to them the annuities from time to time. Considerable lapse of time does not prevent the court from making its order: *Innes* v. *Mitchell* (3). [He referred also to *In re Cottrell* (4); *In re Ellis* (5); *In re Wilson* (6); *In re Ball* (7); *In re Twiss* (8)]. In any event, the annuities in this case were all valued during the lifetime of all the annuitants and the court will certainly not reverse the administration now: *In re Ross* (9).

Wilfrid Hunt for the residuary legatees. The rule is that, where annuities must be valued because the estate cannot meet them in full, they are to be valued as at the date of the order. If, therefore, the court does not find that a fund to meet Eliza Bradberry's annuity in full ought to be set aside, she is entitled to its capitalized value ascertained as at the date of the order. [He referred to *Todd* v. *Bielby* (10); *Potts* v. *Smith* (11); *Heath* v. *Nugent* (12) and *In re Wilkins* (13).] The executors of Clara Jones and the executor of William Edwards, however, are entitled to receive only sums equal to such parts of the annuities given to Clara Jones and William Edwards as were payable over the periods between the deaths of the testatrix and of those two annuitants.

In re FRY.

By her will dated February 5, 1937, the testatrix, Josephine Louisa Fry, bequeathed pecuniary legacies to certain legatees and, after a specific devise, annuities to Rose

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(1) [1906] 2 Ch. 648; [1907] 2 Ch. 8.
(2) [1903] 2 Ch. 424.
(3) (1846) 1 Ph. 710.
(4) [1910] 1 Ch. 402.
(5) [1935] Ch. 193.
(6) [1940] Ch. 966.
(7) [1940] 4 All E. R. 245.
(8) [1941] Ch. 141.
(9) [1900] 1 Ch. 162.
(10) (1859) 27 Beav. 353.
(11) (1869) L. R. 8 Eq. 683.
(12) (1860) 29 Beav. 226.
(13) (1884) 27 Ch. D. 703.

Sheppard and Mary Jones, payable out of a fund sufficient by its income to answer them to be appropriated by her trustees who had power to resort to the capital of the fund should income ever be insufficient. She directed that when the fund had been appropriated her residue should be discharged from the annuities and that, subject to their being paid, the fund should go back into residue. She gave another pecuniary legacy and then the whole residue to Wilfrid Gaisford absolutely. At the death of the testatrix on June 28, 1940, her estate was not enough to pay the legacies in full and to provide a fund the income of which would satisfy the annuities, nor was it enough to pay the legacies and the capitalized value of the annuities. The annuitants chose to have the abated amounts of the valuations of their annuities as at the date of the death of the testatrix treated as pecuniary legacies and to have government annuities bought with them. The matter, however, was not pursued, and in January, 1941, Rose Sheppard died. Her executrix claimed to be entitled to the amount of her annuity capitalized as at the date of the death of the testatrix, and, on May 26, 1941, this summons was taken out for relief similar to that asked by the summons in *In re Bradberry.*

Pascoe Hayward for the surviving executor of the testatrix.

Waite for the executrix of Rose Sheppard. The proper time as at which to ascertain the capital value of Rose Sheppard's annuity is the date of the death of the testatrix. Alternatively, there was an agreement between the annuitants and the executors of the testatrix that the capitalized sum should be payable to the annuitants, so the proper time at which to ascertain the capital value of that annuity would be, if not the date of the death of the testatrix, at all events the date when the agreement was reached.

J. V. Nesbitt for Mary Jones. There has not been any agreement here or, if there has, it is not an agreement sufficient to fix the rights of the annuitants. Those rights are, therefore, to be determined by the court, and Mary Jones' annuity should be valued as at the date of the death of the testatrix.

G. D. Johnston for the residuary legatee. The right of the annuitants to have a lump sum depends on what the executors do and not on mere agreement. What is required is a decision by the executors to treat the estate as if it were insolvent and the date of that decision is the equivalent of an order of the court. In this case there was no, or no sufficient, agreement to amount to such a decision. All that the executrix of Rose Sheppard is entitled to is a sum equal to such part of the annuity bequeathed to her as was payable over the period between the death of the testatrix and the death of Rose Sheppard.

Cur. adv. vult.

1942. Nov. 3. UTHWATT J. read the following judgment: The circumstances in the two cases differ, but the points which arise for decision are the same. They are, first, whether the acts of the parties have fixed the rights of the annuitants, and, second, assuming that the rights have not been so fixed, what is the proper method of dealing with the annuities?

The first question may be disposed of shortly. Where, in the course of administration, it becomes necessary for purposes of division of the estate to place a value on annuities it is, I think, within the competence of the legal personal representatives to do what the court would order to be done, for the case is not one where a judicial discretion has to be exercised. Executors properly feeling a difficulty about the course they ought to pursue are entitled to take the court's directions, but it is not necessary for them so to do. In my view, nothing which has happened in either case amounts to an act of administration settling the position of the annuitants. One may assume for the purpose in hand that the advice given to the executors in the two cases was in all respects correct, but in neither case was anything done towards carrying into effect any determination by the executors, and in neither case was there any binding pledge to administer in any particular way. A decision to act in a particular way—as in *Fry's* case—is not, in my view, enough, and in *Bradberry's* case there does not appear to have been any settled decision at all. It is not necessary, for the purposes of arriving at a conclusion in either case, to decide whether, in order to crystallize the position, anything less than actual distribution following on a decision is sufficient, and I do not propose to go further than to say that an intention to administer on a basis correct at the time of the decision is not enough to conclude the position of the annuitants.

The general question, therefore, arises: What is the proper method of valuing annuities in a case where at the time when the matter comes before the court for decision an annuitant is dead? Having regard to the discussion in the Court of

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Appeal in *In re Twiss* (1) it is incumbent on me in determining this matter to do more than rely on the recent authorities.

The necessity for valuing annuities arises in cases where there is an insufficiency of available assets to provide annuities or legacies, or to enable a trust contained in the will to set aside assets sufficient by their income to answer annuities to be complied with, or a power to the like effect to be exercised. In some cases abatement may be necessary; in other cases it may not. The critical fact in all cases is that the testator's intentions as expressed cannot be carried out. In those circumstances the court has, in the words of Farwell J. in *In re Metcalf* (2), "to do the best it can." To my mind that phrase exactly states the duty of the court. The rule of law is that effect is to be given to the testator's wishes as expressed in his will. The object to be achieved is to give effect to those wishes as nearly as may be when the plane on which they proceed does not exist. If any maxim of equity is applicable it is the familiar maxim: "Equity delighteth in equality."

It is clear, therefore, that the question is one of administration and of administration only. Matters of administration are settled by practice which reflects common sense or, what is to my mind the same thing, reason tempered by convenience. It is desirable that there should be a uniform practice, although, as may be gathered from *In re McEuen* (3), that does not mean that alternative methods of administration may not be open. Circumstances alter cases.

One matter of practice is settled beyond dispute, namely, that the valuation should be an actuarial valuation and that facts, such as the health of the annuitant or the risks attendant to his vocation, are to be disregarded. The sum which the particular annuity might realize if sold is, therefore, irrelevant. This was the settled rule in the time of Lord Eldon L.C.: see *Ex parte Thistlewood* (4). It is also settled that the valuation should be made, wherever possible, by reference to the sum which is required to purchase a government annuity of the amount specified by the testator. If the annuitant is absolutely entitled to the annuity, then it lies with him, as the only person interested, to say whether he will take the capital value or the abated value or will have the value laid out in the purchase of an annuity. That right is not connected with the valuation of the annuity. It is a consequence of the fact

(1) [1941] Ch. 141.

(2) [1903] 2 Ch. 424, 429.

(3) [1913] 2 Ch. 704.

(4) (1812) 19 Ves. 235.

that the annuitant is the only person interested in the disposition of the sum at which the value of the annuity is assessed. The justification for these rules of valuation lies in their certainty and convenience. If they embody a principle it is that speculation—be it on the annuitant's life or on the worth of the testator's estate as a security for a continuing annuity—is to be avoided.

The question which then arises is what facts are to be looked at when the question of valuation arises, and with that there is connected the question of the date as at which the annuity is to be valued. An estate may, when valued at the death, appear insufficient, but, subsequently, while in course of administration, it may become sufficient, or the converse may be the case. Whether there is or is not to be a valuation of an annuity can be finally determined only in due course of administration. On that there is not, I think, room for dispute. The right of the annuitant is to receive his due in the proper course of administration, and what is his due can only then be determined. I am unable to see any reason why an apparent sufficiency or insufficiency at the date of the death should, as was argued before me, be relevant in determining the date as at which an annuity is to be valued. Nor can I see that the position of the estate at the end of what is termed the executors' year—a matter which was also argued—is of any relevance on that topic. The question is what ought to be done as regards the annuities, not what ought to have been done as regards the general administration of the estate. I may here conveniently deal with one further argument which was addressed to me. It was to the effect that in all cases an annuitant should be regarded from the outset as a person who, on the death of the testator, not only had a vested right to his annuity, but also a vested right, if the estate should prove insufficient, to the value of the annuity at the testator's death, or, alternatively, to the value of the annuity at the date of the order made with respect to the valuation of the annuities with an addition in respect of the annuity for the period between its commencement and the date of the order. I cannot accept this argument. The answer to it is that the manner of the satisfaction of the annuity is a question of administration only. There is only one right, namely, the right to an annuity, such right to be satisfied in a due course of administration.

Before referring to the authorities bearing on annuities, it is desirable to look at the question from the point of view

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of general principle. In the particular cases before me the question arises by reason of the death of an annuitant before any act has been done in the course of administration which has resulted in his position being crystallized. The conflicting contentions are: (1.) that the position at the date of death is to be looked at and the annuities valued at that date, and (2.) that the position at the date when the matter is decided is to be regarded. In other words, is the court, in cases such as that before me, when working out the effect to be given to an interest, the extent of which depends on continuance of life, to neglect the fact that to its knowledge the life has ceased? If one bears in mind that the question is one of administration only, and that the duty of the court is to do the best it can, there can, in my view, be but one answer to the question and that is that the court should take into account every relevant fact that is known at the date when the decision is to be made and work out the rights of the parties accordingly. The death of an annuitant before the court's decision enables the court exactly to measure what was in fact given to him. Why should the court neglect known facts and put itself in the position of a prophet who, when he knows all the facts, projects himself to an earlier date and predicts as the span of life of a person known to be dead the length of life of the hypothetical person who lives his actuarial life? Few would trouble to acquire the mantle of Elijah to make such a prophecy. In my view, one who did so would be only wasting his coupons (1).

It is, I think, useful to refer to certain cases having no relation to annuities which exemplify the broad principle that where the question at issue is the method of working out rights, regard can be had to events which have happened since the right accrued. The first case is *Bwllfa & Merthyr Dare Steam Collieries* (1891), *Ld.* v. *Pontypridd Waterworks Co., Ld.* (2). The headnote is: "Owners of coal mines under "and near waterworks gave the undertakers notice under

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(1) For the benefit of posterity it may be explained that at this time a "clothing book" was officially issued to each individual, covering a specified period and containing a strictly limited number of "coupons," and it was not possible to purchase any article of clothing without surrendering the prescribed number of coupons, so many for an overcoat, so many for a pair of gloves, and so on. The number to be surrendered on the purchase of Elijah's mantle is not known, but doubtless it would have exceeded a year's supply. —Ed.

(2) [1903] A. C. 426.

"s. 22 of the Waterworks Clauses Act, 1847, that they intended "to work the coal. The undertakers replied by a counter-"notice requiring the mine owners not to work and stating "their willingness to make compensation. In an arbitration "under the Act and the Land Clauses Acts to assess the "compensation the mine owners gave evidence to prove that "coal rose in value after the date of the counter-notice :— "*Held*, that there was no purchase of the coal or transfer of "the property in the coal ; that the inquiry was not what was "the value of the coal at the date of the counter-notice, but "what would the coal owners, if they had not been prohibited, "have made out of the coal during the time it would have taken "them to get it ; and that the evidence was admissible." In giving judgment the Earl of Halsbury L.C., after stating the questions for debate, said (1) : "If it were a purchase, the "rights and liabilities and profits, if there were any, would "pass to the purchaser, and its value, with all its possibilities, "would pass at the time notice to treat was given ; but, if "the question is that which I think it was, then the person "who had to make the calculation of what was the com-"pensation ought to have arrived at the sum which experience "has now shewn to be the correct amount. It is true that he "probably would not have been able to arrive at that sum "accurately, but he ought to have contemplated upon such "material as he had what would be the true sum. He ought "to have considered the possible rise or fall of prices ; but, "as I have said, he probably would have made a mistake. "We now know what would have been the true sum, and the "proposition baldly stated appears to be that, because you "could not arrive at the true sum when the notice was given, "you should shut your eyes to the true sum now you do know "it, because you could not have guessed it then. It is, of "course, only an accident that the true sum can now be "ascertained with precision ; but what does that matter? "It seems to me that the whole fallacy of the contention that "you may not look to the facts that have occurred rests upon "the false analogy of a sale." Lord Macnaghten, in his judgment, says (2) : "If the question goes to arbitration"— that is, the question of the amount of the compensation— "the arbitrator's duty is to determine the amount of com-"pensation payable. In order to enable him to come to a just "and true conclusion it is his duty, I think, to avail himself of

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(1) [1903] A. C. 426, 428.

(2) Ibid. 431.

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"all information at hand at the time of making his award "which may be laid before him. Why should he listen to "conjecture on a matter which has become an accomplished "fact? Why should he guess when he can calculate? With "the light before him, why should he shut his eyes and grope "in the dark?" Lord Robertson puts the matter on exactly the same basis (1): "But the point is that as in this instance "the facts are available, they are not to be shut out." Again, in *Williamson* v. *John I. Thorneycroft & Co., Ld.* (2), the widow of a naval officer, on behalf of herself and her son, brought an action against the defendants claiming damages under Lord Campbell's Act and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the negligence of the defendants which had caused the death of her husband. She died before the trial and her executors were substituted as plaintiffs. The question before the court was whether, in assessing damages, regard should be had only to the position at the date when the cause of action arose—in which case the widow's expectation of life at the date of her husband's death would be the material fact—or whether the subsequent death of the widow should be taken into account. It was held by the Court of Appeal that, although the moment at which the damages in a case under Lord Campbell's Act are to be fixed is the moment of the death, that did not mean that the court was to shut its eyes to subsequent happenings and that the court could, in assessing damages, inform its mind of circumstances which had arisen since the cause of action accrued and which threw light on the realities of the case, and that, therefore, the death of the widow was to be taken into account. Again, in *In re West* (3), where the question was as to the value to be placed on a life interest which at the date when the valuation was to be made was known by reason of the death of the donee to have failed, it was held that it would be unfair and inequitable to attribute a past actuarial value to an interest which in fact had not fructified. The same principle of regarding subsequent facts was applied in assessing damages in *Roper* v. *Johnson* (4). In that case the defendants wrongly, at the end of May, 1872, repudiated a contract under which they were bound to deliver coal during May, June, July and August, 1872. The writ claiming damages was issued on July 3, 1872, and the case was heard on August 13, 1872. No evidence was given to show whether or not the plaintiffs could have gone into the market and obtained a new contract for delivery of coals over the contract period. It was held that the damages were rightly assessed by reference to the sum of the differences between the contract price and the actual market price at the several periods agreed on for delivery.

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(1) [1903] A. C. 432, 433.

(2) [1940] 2 K. B. 658.

(3) [1921] 1 Ch. 533.

(4) (1873) L. R. 8 C. P. 167.

A principle is to be drawn from these authorities, namely, that where facts are available they are to be preferred to prophecies. It is obviously required by this principle that, in determining the value of the rights of an annuitant known at the date of determination to be dead, one should act on the basis of that fact. It appears to me, therefore, that it is consistent with an established principle that events subsequent to the death of the testator should be taken into account in determining the value of an annuity. An objection to the application of the principle in a matter of administration is said to be that its application makes the rights of the annuitants—or more accurately what the annuitants are to receive in respect of their rights—depend on the point of time at which the matter is determined, and that point of time rests on the diligence shown by the executors in their administration. That is true, but, to my mind, there is no substance in the objection. No one can complain of a speedy administration. If there be tardy administration the annuitants may bring their suit for administration and the matter can be brought to a head. But the objection may be dealt with on the broader ground that the course of time has brought out the material facts which help in ascertaining the value to the annuitant of the annuity given by the will. Facts which emerge as a result of delay nevertheless remain facts.

The next question is whether there is any established rule of practice which requires a different course to be pursued. I am not here directly concerned with the practice followed where no annuitant is dead, but that practice must, of course, be considered. Where no annuitant is dead and the matter arises for decision shortly after the death of the testator, authorities can be found in which the valuation was made at the testator's death and no contention in favour of a different method of valuation was put forward. Where the matter arose for decision at an early stage the difference between the sum ascertained by a valuation of the annuity at the death and the sum ascertained by adding the arrears to the date of

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the order to the future value of the annuity is not great. While it may be said, therefore, that this rule of practice does neglect the increased expectation of life actuarially accorded to a living annuitant over his expectation at the testator's death, the matter is not of much moment. Where a considerable period of time has elapsed between the date of the death and the date of the order, the difference may be of some moment, and there is authority in that class of case for the adoption of the latter method: see *Heath* v. *Nugent* (1) and *In re Wilkins* (2).

Turning to the authorities where the case of a deceased annuitant arose for consideration, I need not refer to any case earlier than *Todd* v. *Bielby* (3). In that case, after stating the rule of practice to be that, where no annuitant was dead at the date of the order, the valuation was made as at the testator's death, the rule of practice applicable where an annuitant was dead was stated to be that all the annuities were to be valued at the sum of the arrears to the date of the order, plus the value at that date. The rule applicable where an annuitant is dead, as stated in *Todd* v. *Bielby* (3) was followed by James V.-C. in *Potts* v. *Smith* (4); in *In re Ellis* (5); by Farwell J. in *In re Ball* (6); in *In re Cox* (7); and by Simonds J. in *In re Twiss* (8). There is, so far as I am aware, no authority to the contrary. A bald statement, as in *Todd* v. *Bielby* (3) that, where no annuitant is dead, the testator's death fixes the date for valuation, and that, where any annuitant is dead, the date of the order is to be taken for valuing all annuities, is difficult to justify if the death of some one annuitant is to be the only fact to be taken into account in any case. To my mind, the death of an annuitant before the date of the order furnishes an outstanding example, but only an example, of the class of case in which valuation at the date of the order should be made. The matter requires to be looked at on broader lines. The date of death can be properly taken as the date for valuation where there has been no real change in the position of the annuitants between the date of the death and the date of the order. The justification for this course lies in its convenience. Where there has been such a change—for example,

(1) 29 Beav. 226.
(2) 27 Ch. D. 703.
(3) 27 Beav. 353.
(4) L. R. 8 Eq. 683.
(5) [1935] 1 Ch. 193.
(6) [1940] 4 All E. R. 245.
(7) [1938] Ch. 556.
(8) [1941] Ch. 141.

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the death of an annuitant, a prolonged administration justifying a review of the expectancy of life of annuitants as that would appear at the testator's death, the spectacle of an annuitant living at the date of the order who has outlived the actuarial life that would be allotted to him at the death of the testator, or an estate becoming insolvent after it has been administered for a time on the footing that it was sufficient and payments to annuitants made on that basis—valuation at the date of the order is not only the logical course but the only fair course. Convenience gives way to reason.

I am, accordingly, of opinion that facts as they stand at the date of the order directing a valuation are to be taken into consideration in determining the value of all annuities in any case where an annuitant is dead.

The order for which I have now given my reasons is, accordingly, in *Bradberry's* case, that the deceased annuitants are to receive their annuities so far as unpaid to the date of their respective deaths, and that the living annuitant is to receive hers in full, to be secured for the future in manner directed by the will. In *Fry's* case, the value of the annuity to the deceased annuitant is to be the amount of the arrears to the date of that annuitant's death, and the value of the annuity of the living annuitant is to be the sum of the arrears to the date of the order, plus the value of her annuity from that date, that total sum to be abated if necessary.

Solicitors in *In re Bradberry: Holmes, Son & Pott; Routh, Stacey, Hancock & Willis, for Stapleton & Son, Stamford; D. W. Drummond; Waterhouse & Co.*

Solicitors in *In re Fry: Shaen, Roscoe & Co., for Wansboroughs, Robinson, Tayler & Taylor, Bristol; Rider, Heaton, Meredith & Mills, for A. F. B. Thatcher, Midsomer Norton; Robinson & Bradley, for N. Strickland & Fletcher, Bristol.*

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Followed. Re A Solicitor. [1951] 1 All E.R. 592.

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Oct. 22 ;
Nov. 5.

In re TAXATION OF COSTS.

In re A SOLICITOR.

Practice—Costs—Bill—Withdrawal and delivery of fresh bill—Unpaid disbursements not under separate heading—Negligence of solicitor—R. S. C., O. LXV., *r.* 27, *reg.* 29 (*a*).

A solicitor, who had acted for a client in litigation, delivered a bill in which 298*l.* in respect of counsel's fees which had not been paid were not expressly stated not to have been paid and were not set out under a separate heading as unpaid items of disbursements in accordance with R. S. C., O. LXV., r. 27, reg. 29 (*a*). The solicitor asked by this summons for leave to withdraw the bill and deliver a fresh one containing proper entries in respect of counsel's fees. The evidence was that, in the litigation, the client was ordered to pay certain costs with the usual set-off, that the solicitor paid the counsel's fees after the bill was delivered, and that, in the result, in the taxation and set-off as between party and party, the client received the benefit of those payments. The evidence was, further, that owing to the solicitor's lack of staff and the client's request for prompt delivery, the bill was drafted by an outside costs draftsman who did not see that the items were separately listed, that the solicitor did not scrutinize the bill before he signed it, and that the client knew that some counsel's fees had not been paid :—

Held, that the court had jurisdiction to allow the bill to be withdrawn and a fresh bill delivered, and would exercise that jurisdiction as otherwise the client would obtain the benefit of the payments which the solicitor had made and had failed to note properly in the bill.

ADJOURNED summons.

The facts are stated in the headnote.

Denning K.C. and *George Maddocks* for the solicitor. The bill does not comply with O. LXV., r. 27, reg. 29 (*a*) (1), but the solicitor ought to be allowed to withdraw it and to deliver a fresh one showing the 298*l.* as unpaid items of disbursements under a separate heading as otherwise he will be unable to recover what he has paid: *Peter Thomas & Co.* v. *Smith* (1); *Elsworth* v. *Fox* (2). The omission to include the 298*l.* as unpaid items of disbursements under a separate heading was wholly due to the costs draftsman's mistake and the solicitor's failure to verify the bill. Nothing prejudicial to the client has taken place and he ought not to be allowed to take advantage of the mistake which has been made.

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(1) By R. S. C., O. LXV., r. 27, reg. 29 (*a*) :—" In taxations pursuant to the Solicitors Act, 1932, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out such unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed by the taxing master if they were actually made before the commencement of the proceedings in which the taxation takes place, and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client . . . ."

Douglas Lowe (*Gerald Gardiner* with him) for the client. The present bill ought to stand. This is not a case in which the court in its discretion will allow the solicitor to withdraw it and to deliver a fresh one. The settled practice until *Peter Thomas & Co.* v. *Smith* (1) always was that items unpaid at the time when the bill was delivered and not set out in the bill under a separate heading were disallowed: *In re Thompson* (3); *Sadd* v. *Griffin* (4); *In re Hildesheim* (5). Save for *Peter Thomas & Co.* v. *Smith* (2) there is no authority for departing from that practice and, even if there were, this is not a case on the merits of which the court ought to do so.

UTHWATT J. The exact circumstances in which this bill came to be drawn do not appear to me to be very material except that they indicate no desire or intention on the part of the solicitor to trick the client or take advantage of him. There would certainly appear to have been stupidity and negligence on the part of the solicitor, and it might be suggested that the client's opposition to this application shows cupidity, for he has got the benefit of payments made by the solicitor and is relying on a technical rule to prevent the solicitor from recovering those sums from him.

However that may be, there is undoubtedly jurisdiction in the court to allow a solicitor to withdraw a bill and to deliver a fresh bill. There are old authorities to that effect, and recently the Court of Appeal, in *Peter Thomas & Co.* v. *Smith* (6), exercised that power in circumstances which, so far as can be gathered from the only available material, were exceedingly like those of the present case. The question

(1) Unrep., May 2, 1932.

(2) Unrep. (1909), see Annual Practice, 1942, p. 1517.

(3) (1885) 30 Ch. D. 441.

(4) [1908] 2 K. B. 510.

(5) [1914] 3 K. B. 841.

(6) Unrep., May 2, 1932.

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whether that power ought to be exercised in any particular case depends on all the circumstances of that case. The fact that it has been exercised in one way in one case is no authority for saying that it ought to be exercised in the same way in a different case, but giving to the matter the best consideration I can, it appears to me that that jurisdiction ought to be exercised in the present case. My chief reason for coming to this conclusion is that, unless it is exercised, the client will get the pecuniary benefits resulting from the payments which the solicitor has made and has failed to note properly in the bill.

Accordingly, I propose to order the taxation of the client's costs as between solicitor and client for everything incurred to date under the order for the taxation of the solicitor's costs. The client's costs of this application are to be taxed as between solicitor and client. The solicitor will pay all such costs. Subject to those taxed costs being paid within fourteen days after taxation, the solicitor will have leave to withdraw the existing bill and to deliver a fresh bill not distinguished from it in any material particular save that proper entries may be made in respect of counsel's fees. In other words, the solicitor is not to use this occasion as an opportunity either for increasing or for decreasing the charges appearing in the existing bill, or for striking out items or putting in fresh items.

Solicitors for applicant: *Botterell & Roche, for Marco Blumberg, Manchester.*

Solicitors for respondent: *Hays, Roughton & Dunn.*

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BATTS COMBE QUARRY, LIMITED *v.* FORD AND OTHERS.

C. A.

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Nov. 9, 10, 11.

Contract—Covenant in restraint of trade—Breach—Provision of working capital for new business—Assistance in preliminary negotiations.

The vendors of the Batts Combe quarry covenanted with the purchasers "that they would not within ten years either solely or "jointly with or as agent officer manager servant director or "shareholder of any other person or company directly or indirectly "carry on or assist in carrying on or be engaged concerned interested "or employed in the business of a quarry within 75 miles as the "crow flies of Batts Combe quarry." One of the vendors within ten years provided a sum of money to enable his three sons to purchase the Chelms Combe quarry in the immediate neighbourhood of the Batts Combe quarry and for working capital. He also took part on his sons' behalf in preliminary negotiations for the purchase of machinery and equipment for the Chelms Combe quarry. He was not a partner in the sons' business, nor in any way financially interested in it, and he took no part in its management:—

Held, that, by providing the capital of the sons' business, the father "assisted in carrying it on"; that, both by the provision of the capital and by taking part in the negotiations, he was "concerned in" the business; and that, in taking part in the negotiations, he was "employed in" the business; and that he had broken his covenant in these respects.

APPEAL from Bennett J.

The facts appear in the headnote. Bennett J. gave judgment for the defendants (the father and the three sons), and the plaintiffs (the purchasers of Batts Combe quarry) appealed. So far as the sons were concerned the case does not call for a report, as the Court of Appeal without calling on the defendants on this part of the case agreed with Bennett J. in finding that the sons were not in partnership with their father, and that the mere acceptance by them of his bounty did not amount to a procuring by them of the breach, if any, of his covenant. The report is, accordingly, limited to the question whether the father had broken his covenant by providing the purchase price and working capital of the sons' business or by assisting in the negotiations.

Comyns Carr K.C., *Astell Burt*, and *Mrs. A. J. Morrice* for the plaintiffs. By providing the capital of the sons' business, the father "assisted in carrying it on," for without his money it could not have been carried on. It is immaterial that the assistance was given before the business was actually begun.

So also the assistance of the father in the preliminary negotiations was either "assisting" or being "employed or concerned "in" the business.

Blanco White K.C. and *Holroyd Pearce* for the defendants. The father committed no breach of covenant. The provision of capital and the negotiations for machinery were preliminary acts, and the doing of a preliminary act is not carrying on a business, which is a process. A company promoter does not carry on the business of the company, nor assist in doing so. The words of this covenant are not "assist *to* carry on" but "assist *in* carrying on."

LORD GREENE M.R. The question which falls for decision is, whether or not the father committed breaches of his covenant. Bennett J. dealt with this part of the case on the footing that the only breach alleged consisted in giving to the sons the money required to set them up in their business, and he directed his attention, on the question of construction, to the words "assist in carrying on." He formed the view that, if those words were what he described as unlimited in their meaning, a breach would have been established. He made clear what he meant by the word "unlimited," because he proceeded to construe the words "assist in carrying on" as referable to the words "or as agent officer manager servant "or director of any other person or company." He applied the reddendo singula singulis interpretation, and then said (which, indeed, would appear to follow) that the giving of money for the purpose of setting up the business was not assisting in carrying it on "as agent officer manager servant or "director," because a mere giver of the necessary capital does not fall within any of those words.

With all respect to Bennett J.'s view, I find it impossible to accept that limited construction of the words "assist in "carrying on." It appears to me that those words, like the words "carry on" themselves, are referable to everything which has gone before, and that both the words "carry on" and the words "assist in carrying on" are covered by the words indicating personal action and action as agent, officer, or servant. Mr. Blanco White argued that the words "assist "in carrying on or be engaged concerned interested or employed "in the business of a quarry" cannot, on their true construction, refer to what he described as preliminary acts necessary to enable the business to be carried on. He argued that no such business as is referred to in the covenant existed during the stages of the purchase of the quarry and installation of the machinery, and that, for the purposes of this covenant, the business of quarry owners carried on by the sons must be treated as having begun not earlier than when they first began to extract stone from the quarry. It seems to me, however, having regard to the scope and intention of such a covenant, that that is to place far too narrow a construction on the words. The first phrase that requires attention is "assist in carrying on." I should have thought that those words were wide enough to cover a person who provides the necessary capital to enable a business to be carried on. It is not merely the equipment of a business which is brought about by the provision of capital, but its whole life. In other words, the provision of the capital which is necessary to set up a business gives the business life, and its effects continue after the installation is complete for the simple reason that the business as carried on owes its origin entirely to the provision of the capital. I can think of no more effective way of assisting a person in carrying on his business than to provide for him free of charge the necessary equipment to enable him to begin the business. According to Mr. Blanco White's argument, it would not be a breach of a covenant of this kind in an assignment of the goodwill of a boot shop if the covenantor purchased another shop for his sons, fitted it up, bought the stock and arranged the window display ready for the opening of the shop on a certain date. It seems to me that in such a case a breach of covenant would be established.

Quite apart, however, from the words "assist in carrying on" there are other words here which appear to me to cover the case. In my view, in doing what he did, the father was "concerned in" the sons' business. The word "concerned" is of quite general import. Clearly it cannot be limited to "concerned" in the sense of financial interest or of being an employee of the business. Again, I can see no more effective way of being concerned in a business than by providing the capital necessary to establish it, and the word "concerned" seems also to cover the assistance given by the father in the course of the negotiations. Again, I think that the words "employed in the business" cover the acts of the father in connexion with those negotiations. The part that he took in those negotiations, representing his sons during their necessary absence on other work, was that of an agent or

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employee. The acquisition of machinery and its installation was part of the business activities of the sons, and, as their representative, he negotiated in that matter and gave advice. In my opinion, the word "employed" is sufficient to cover what he did.

In the result, therefore, in my opinion, the appeal, as against the father, succeeds. There will be an inquiry as to damages.

LORD CLAUSON. I agree that the right way of dealing with the appeal is to declare that the father has committed a breach of his covenant in the deed of assignment by (1.) negotiating for the supply to the other defendants of the machinery of the Chelms Combe quarry, and (2.) supplying capital to them for the purposes of the business of that quarry, and that there should be an inquiry as to the damages occasioned to the plaintiffs by that breach.

DU PARCQ L.J. I agree.

Appeal allowed against first defendant.

Solicitor for plaintiffs: *J. R. Cort Bathurst.*
Solicitors for defendants: *Reed & Reed, for G. H. S. Earle, Axbridge.*

J. W. H.

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PROGRESSIVE SUPPLY COMPANY, LIMITED *v.* DALTON.

Emergency legislation—Control of industry—Check trading—Prohibition of poundage—Defence (General) Regulations, 1939 (*St. R. & O.,* 1939, *No.* 927), *reg.* 55 (1.) (*a*)—*Check Trading (Control) Order,* 1942 (*St. R. & O.,* 1942, *No.* 1235)—*Check Trading Direction,* 1942 (*St. R. & O.,* 1942, *No.* 1236).

The plaintiffs carried on the business of "check trading," by which they supplied customers of selected shops with checks or trading orders which the customers used to purchase goods on credit from retail shopkeepers who had entered into agreements with the plaintiffs to supply goods against checks. When each check was exhausted it was retained by the shopkeeper at whose shop the last purchase was made and presented to the plaintiffs who paid its value in cash, less a discount, to the shopkeepers who had supplied the goods and collected the sum in question from the customer by equal weekly instalments, together with an additional sum described as "poundage," at the rate of 1*s.* 6*d.* in the pound on the value. The Board of Trade, in exercise of its powers under reg. 55 (1.) (*a*) of the Defence (General) Regulations, 1939, made the Check Trading (Control) Order, 1942, which provided that no person should carry on the business of check trading in contravention of any directions given by the Board, and by the Check Trading Direction, 1942, the Board prohibited all check traders from charging or accepting, or causing to be charged or accepted, any poundage:—

Held, that the plaintiffs, although not engaged in producing, buying, or selling any articles, were promoting and facilitating the distribution, disposal, or consumption of articles by providing customers with credit facilities, and, therefore, the Board was acting within its powers under reg. 55 (1.) (*a*) in regulating the plaintiffs' business and prohibiting the charging of any poundage by the order and direction of 1942.

It is not for the court to consider or to require proof of the necessity of an order made by a competent authority under the Defence Regulations. It is bound to assume that it is necessary.

Rex v. *Comptroller-General of Patents. Ex parte Bayer Products, Ld.* [1941] 2 K. B. 306, applied.

MOTION.

The plaintiff company claimed against the defendant, the President of the Board of Trade, a declaration that the Check Trading (Control) Order, 1942, and the Check Trading Direction, 1942, made by the Board of Trade under the powers conferred by reg. 55 (1.) (*a*) of the Defence (General) Regulations, 1939 (1),

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(1) By Defence (General) Regulations, 1939, reg. 55 (1.): "A "competent authority, so far as "appears to that authority to be "necessary in the interests of the "defence of the realm or the "efficient prosecution of the war, "or for maintaining supplies and "services essential to the life of "the community, may by order "provide—(*a*) for regulating or "prohibiting the production, treatment, keeping, storage, movement, transport, distribution, "disposal, acquisition, use or "consumption of articles of any "description . . . ."

By Check Trading (Control) Order, 1942: "1. No person shall "carry on the business of check "trading in contravention of any "directions given by the Board of "Trade. 2. Without prejudice to "the generality of para. 1 the "directions issued thereunder may "include directions prohibiting, "restricting, or otherwise regulating and controlling, poundage "and discount . . . . 4. In this "order . . . . (ii.) 'poundage' "means the consideration (however described) payable by the "retail customer:—(*a*) in respect "of the supply of a check, which "consideration is either in excess "of the purchasing value of the "check or has the effect of reducing such purchasing value . . . ."

By Check Trading Direction, 1942: "1. No person carrying on "the business of check trading, "shall charge or accept, or cause "to be charged or accepted, any "poundage."

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were ultra vires the defendant and the Board of Trade and invalid. The plaintiff company was engaged in the business of " check trading." A check trader entered into agreements with selected shopkeepers under which the shopkeeper agreed to supply any customer of the check trader with goods to the customer's selection at cash values up to the amount specified in a document commonly known as a check or trading order. Each check was issued by the check trader to the customer on payment of the sum of 1*s.* in the pound on the face value of the check, the customer contracting with the check trader to pay the balance by nineteen weekly instalments of 1*s.* in the pound on the face value of the check, which ranged from 10*s.* to 4*l.* In addition, when he obtained the check the customer paid the check trader a poundage at the rate of 1*s.* 6*d.* in the pound on the face value of the check. The customer could then obtain goods at net cash values at any shop with whom the check trader had an agreement merely on production of the check. When goods to the face value of a check had been supplied, the shopkeeper sent the check to the check trader who thereupon paid the shopkeeper the amount of his account, less a discount agreed between them. The weekly instalments due from customers to the check trader were collected by collectors employed by him.

Sir Walter Monckton K.C., *Harman K.C.* and *P. Devlin* for the plaintiffs. The Check Trading Order and Direction exceed the authority conferred by reg. 55 (1.) of the Defence (General) Regulations and they are, therefore, ultra vires the Board of Trade. It cannot have been necessary in the interests of the defence of the realm or the efficient prosecution of the war that this order should be made. The plaintiffs are not engaged in the production of or trading in any article of commerce. What they do does not affect production in any way. It is simply a method of affording credit facilities to persons, mainly of the industrial classes, to purchase necessaries. The poundage charged by the plaintiffs goes to remunerate the collectors, and to prohibit charging poundage will prevent the plaintiffs' business from being carried on. [They referred to *Rex* v. *Comptroller-General of Patents. Ex parte Bayer Products, Ld.* (1).]

Sir Donald Somervell A.-G., *Sir David Maxwell Fyfe S.-G.* and *Danckwerts* for the Board of Trade. Admittedly, the object

(1) [1941] 2 K. B. 306.

of check trading is not to deal in articles directly but to facilitate and encourage the purchase of them, but the attainment of that object involves a system under which goods are disposed of or acquired within reg. 55 (I.), and, therefore, the order and direction are not ultra vires. To prohibit charging poundage will not prevent the plaintiff company from carrying on its business as it has another source of income, namely, the discount allowed by the shopkeepers. Further, no matter how popular check trading may be among the classes who benefit by it, it cannot properly be said to be of national importance, and it is a system of trading which the Board of Trade has full power to regulate and control.

Cur. adv. vult.

1942. Nov. 19. FARWELL J. It will be noticed that the transaction involved in check trading in no sense involves the buying or selling of goods of any kind by the plaintiff company. The company does not deal in goods in the ordinary sense of the word. It provides a system by which the customer can obtain goods from the shopkeeper in exchange for a check, the shopkeeper obtaining his money from the plaintiff company, and the plaintiff company obtaining its money from the customer by weekly instalments. It is said that such a dealing is not within reg. 55, and, therefore, that the Check Trading (Control) Order, 1942, and the Check Trading Direction, 1942, are ultra vires the defendant. It was suggested, I think rather faintly, that there was no evidence filed on behalf of the defendant to show that such an order was necessary for any of the purposes mentioned in reg. 55 (I.), but, in my judgment, that is not a matter for this court. If the Crown, acting through its proper servant, makes a regulation, it must be taken to be a regulation which the Crown considers to be necessary for the defence of the realm and the other reasons mentioned. It is not for this court to consider whether there is evidence of any necessity for the making of such an order. That, I think, appears quite clear from the decision of the Court of Appeal in *Rex* v. *Comptroller-General of Patents. Ex parte Bayer Products, Ld.* (1).

I must, therefore, act on the assumption that there was and is a necessity for the making of the Check Trading (Control) Order, 1942. That does not mean that, in making the order,

(1) [1941] 2 K. B. 306.

the President of the Board of Trade may not have attempted to do something which was not within his power. The whole question turns on the true construction of the wording of reg. 55 (I.) (*a*). It will be noted that the words are very wide. The business which the plaintiff company carries on is not a business for the "production, treatment, keeping, storage, "movement, transport . . . . of articles of any description," and if the regulation had stopped there I should have held that there would have been no power in the Board of Trade to make the order which they purported to make, but the regulation proceeds to refer to the "distribution, disposal, "acquisition, use or consumption of articles of any description." The plaintiff company, as I have said, does not attempt to deal in any way with any articles by selling them to the public, but it promotes and facilitates the sale of goods by certain retailers to certain members of the public by enabling a customer who desires to make use of the company's services to purchase goods by instalments. In my judgment, a company whose business is thus to promote and facilitate the distribution or disposal or consumption of articles of any description is doing that which is described in the last part of the regulation, and, therefore, the President of the Board of Trade has power to regulate this form of trading. There is, therefore, no ground on which the plaintiff company is entitled to the relief which it seeks.

Judgment for defendant.

Solicitors: *J. D. Langton & Passmore; Solicitor, Board of Trade.*

H. L. L.

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Mortgage—Leasehold—Option to purchase freehold reversion—Right to exercise option assigned to mortgagee—Option exercised by mortgagee—Foreclosure—Claim by mortgagor to redeem mortgaged property together with freehold reversion.

The lessees of property comprised in a building lease which gave them an option to purchase the freehold reversion mortgaged the property and on the same day assigned to the mortgagee the right to exercise the option. The mortgagee exercised the option and obtained from the lessors a conveyance of the freehold reversion. An order having been made in foreclosure proceedings fixing a date for the redemption of the property, one of the mortgagors took out a summons in those proceedings for a declaration that, on redemption of the mortgaged property and payment of the purchase price of the freehold reversion, the mortgagors were entitled to require a conveyance to them by the mortgagee of the freehold reversion:—

Held (reversing the decision of Farwell J.), that the case was analogous to that where a mortgagee renewed a renewable leasehold mortgaged to him, and that, therefore, the mortgagees were ? entitled on redemption of the mortgage to have the freehold reversion transferred to them, subject to payment of the proper expenses of obtaining a conveyance of the freehold reversion, including the purchase price.

Appeal from Farwell J.

On December 10, 1936, the corporation of Leicester granted a building lease to George Harry Hannam and William Frederick Botterill Smith for a term of 99 years at a rent of 216*l.* a year for the first five years and 269*l.* a year for the residue of the term. In the lease the lessees covenanted to erect on the premises before September 29, 1939, at their own cost, shops with service flats over them, and cl. 5 contained an option to the lessees, subject to their erecting buildings in accordance with their covenants, to purchase the freehold reversion of the property for the sum of 5377*l.* on giving six months' notice in writing to the corporation before March 25, 1941. On October 15, 1937, the lessees mortgaged the property to George Albert Nelson and assigned to him the right to exercise the option. On March 4, 1941, a summons for foreclosure was taken out by the mortgagee against the mortgagors. On March 25, 1941, the corporation conveyed the property to the mortgagee on payment of the sum of 5377*l.* 10*s.* On May 28, 1941, an order for foreclosure nisi was made and on

November 25, 1941, the master's certificate was filed and the date of redemption (which was subsequently extended to July 7, 1942) was fixed at May 25, 1942, the amount due, as found by the certificate, being 27,122*l.* 3*s.* 5*d.* On June 29, 1942, the mortgagor, Hannam, took out a summons in the foreclosure proceedings asking for a declaration that, on redemption of the mortgaged property and payment of the purchase price of the freehold reversion, the mortgagors were entitled to require a conveyance to them by the mortgagee of the freehold reversion.

Farwell J. held that the principle by which a mortgagee exercising the right to renew a renewable leasehold mortgaged to him must on redemption reconvey the renewed term did not apply, and that the mortgagee, having purchased the freehold reversion, was under no liability to convey it on redemption of the mortgage to the mortgagors if they paid the purchase price. The mortgagor, Hannam, appealed.

Raymond Jennings for the mortgagor, Hannam. The principle relating to mortgages of renewable leases applies to the present case. It is well settled that when in such a case the mortgagee obtains a renewal of the lease the mortgagor will have the benefit of it: *Rakestraw* v. *Brewer* (1). In the present case the option formed part of the mortgaged property and on its exercise by the mortgagee he became liable on redemption to convey it to the mortgagors, subject to their payment of the purchase price. That is in accordance with the principles relating to accretions to mortgaged property as laid down in *Nesbitt* v. *Tredennick* (2) and *In re Biss* (3), neither of which is as strong as this case. A mortgagee cannot take the benefit of a collateral advantage. It is a clog on the equity of redemption: *Noakes* v. *Rice* (4). If the mortgage in the present case had contained a stipulation that the mortgagee might exercise the option for his own benefit, it would not have been enforceable. The present case is far stronger.

Charles Romer K.C. and *Jopling* for the plaintiff. It may suit the mortgagors here to obtain the conveyance of the freehold reversion, but, if they are entitled to this, it must follow that a mortgagee in a similar position could insist on his mortgagor taking the freehold on redemption. This might inflict great hardship on the mortgagor by depriving

(1) (1728) 2 P. Wms. 511.
(2) (1808) 1 Ball & B. 29.
(3) [1903] 2 Ch. 40.
(4) [1902] A. C. 24, 32, 34.

him of the right to redeem on payment of the principal, interest and costs. The only duty of the mortgagee is not to sacrifice or deal detrimentally with the mortgaged property. Here the option would have expired, if the mortgagee had not exercised it, and, had it expired, the mortgagors could not have complained. Therefore the benefit obtained by the mortgagee involved no sacrifice of property comprised in the security: *In re Biss* (1); and *Griffith* v. *Owen* (2). There is nothing to prevent a mortgagee from obtaining a collateral advantage if this does not work to the detriment of the mortgagor. Could the mortgagors be allowed to say years after the mortgagee had exercised the option that they wanted the benefit of that exercise? It may be that, if the option had been the sole security for a loan, its exercise would have enured to the benefit of the mortgagor, but that was not the position. This case is distinguishable from the mortgage of a renewable leasehold when the mortgagee is allowed to add the cost of its renewal to the debt.

LORD GREENE M.R. In my opinion, the claim of the mortgagee in the present case is contrary to the fundamental principles on which courts of equity base themselves with regard to mortgages. The option was part of the security and it was clearly contemplated by the parties that the mortgagee might exercise the option during the currency of the mortgage and so improve his security, and that, if he did so, he would have to pay the purchase price of the reversion. It is said that the real nature of the transaction was that, if the mortgagee chose to exercise the option during the currency of the mortgage, he would be entitled to keep the freehold for himself. In that way he would, as a result of this mortgage transaction, acquire out of the mortgaged property a substantial benefit for himself which, it is said, he could hold as against the mortgagors. That, it is argued, is a collateral advantage which is permissible in a mortgage transaction if it is reasonable and not inequitable.

To that argument, I think there is a very short answer. A collateral advantage under a mortgage transaction must in truth be collateral, and, if it enables the mortgagee to keep and retain as against the mortgagor part of the mortgaged property it cannot be collateral. In the present case the claim of the mortgagee is to retain as against the mortgagors,

(1) [1903] 2 Ch. 40.

(2) [1907] 1 Ch. 195.

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not, it is true, part of the mortgaged property, but the fruit of the mortgaged property. This fruit could never have been gathered without the option, the assignment of which was in its essence an assignment by way of security made to the mortgagee, not to enable him to become the purchaser of the reversion, but to give him a better security. He is, therefore, proposing to treat this transaction, not as a pure mortgage, but as a composite transaction under which he advanced money on the security of a lease and an option on the terms that if he exercised the option he was to keep the reversion for himself. Whether or not a mortgagee could stipulate to have the benefit of an option transferred to him absolutely as something collateral to a mortgage transaction I need not discuss. It might depend on the circumstances whether or not that was a truly collateral transaction, but in the present case the acquisition of the reversion by the mortgagee and his right under the option to acquire it are not collateral to the mortgage transaction but an essential part of it which was contemplated by the parties.

It was argued that so to treat such a transaction as the present might in some cases impose serious hardship on a mortgagor, for, supposing the mortgage was for a small sum and the option was to acquire the freehold for a large sum, the mortgagor might find himself put in the position, if the mortgagee exercised the option, of only being able to redeem on payment of that large sum. That argument leaves me quite unmoved. Any such result is one which necessarily flows from a mortgage of such a peculiar piece of property as an option, and, if a mortgagor mortgages an option to a mortgagee and the option is only exercisable on payment of a sum of money, the mortgagor enters into the transaction on the footing that, if the mortgagee chooses to do so, he is entitled to improve or perfect his security by making that expenditure, and he knows from the beginning that, if the mortgagee does so, he, the mortgagor, will only be entitled to redeem if he reimburses the mortgagee what he has spent. In my view, the true position is that, if the mortgagee buys the reversion to improve his security, and in exercise of the power vested in him by way of security his costs of doing so and the expenses to which he is put in doing so are mortgagee's expenses and can be added to his security. The consequence is that in such a case, if the mortgagor wishes to redeem, he can only do so on payment of that sum in addition to the principal, interest, and costs otherwise owing under the mortgage. It is a mistake to say that the mortgagors could exclude the cost of the reversion from the payment which they had to make on the ground of hardship. When the foreclosure summons was issued on March 4, 1941, the mortgagee had exercised the option, but no conveyance had taken place. When pressed, counsel for the mortgagee submitted that if at that stage the mortgagors had offered to redeem by paying the principal, interest, and costs and offering a sufficient indemnity against the liability of the mortgagee under the exercise of the option, the mortgagee would have been entitled to refuse to assign the benefit of the option which he had exercised. That seems to me to be an impossible view. This is a mortgage, and the essence of a mortgage is that all that a mortgagee is entitled to, apart from a permissible collateral advantage, is his principal, interest, and costs. If the view which has been put before us is right, it would seem to result that the mortgagee would have been entitled to retain for his own benefit the option which he had exercised but which had not yet been completed by conveyance. That appears to be quite untenable. I asked counsel what the position would be in a case where an option to acquire property was the sole subject-matter of a mortgage and it was exercised by the mortgagee during the currency of the mortgage, and what would be the respective rights of mortgagor and mortgagee. The reply was that in that case the mortgagee would have to assign the property that he had acquired under the option to the mortgagor on payment by the mortgagor of the mortgage debt, plus the price of acquiring the property. That answer was manifestly correct. It would be fantastic to suggest that in such a case the mortgagee could claim to keep the property which he had acquired. Counsel sought to distinguish such a case from the present by saying that the reason in such a case would be that the option ex hypothesi was the only security, but that seems to me a distinction which simply will not stand examination. Once an option becomes an essential part of a mortgage transaction, whether it be the sole security or merely one element in the security, the principle is the same.

The real truth, in my opinion, is that a mortgagee who takes as part of his security an option to purchase the freehold reversion on the lease included in the security is in principle in the same position as the mortgagee of a lease which contains

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an option to the lessee to renew. It is established by a number of old authorities—and, indeed, at this time of day no authority is required to establish it—that where the mortgagee exercises the right of renewal he must hold the renewed lease subject to the same equity of redemption as existed in relation to the original lease. Some of the authorities have gone even further than that, and applied the principle even in cases where the mortgagee acquires the lease without there being any right to renew, but it is not necessary to discuss that class of case because here we have the specific case where the option is part of the security and in principle it stands on the same footing as a lease containing a right of renewal which is exercised by the mortgagee during the currency of the mortgage. The analogy seems to me to be a close and convincing one. In the case of the renewal of a lease, part of the subject-matter of the mortgage disappears when the original mortgaged lease comes to an end. Part of the subject-matter of the mortgage, that is the right of renewal, has in the meanwhile borne fruit, namely, the new lease which the mortgagee has acquired. If the mortgagee is bound to treat the new lease as part of his security and redeemable as such, it seems to me on principle impossible to say that in a case where the option is to acquire the reversion, he is entitled to keep the reversion for himself. Some distinction was attempted to be drawn between cases where a right of renewal is exercisable without a payment in money and cases where a payment in money is required, and again in the course of the argument I put the question whether in the case of a right of renewal which could only be exercised on payment of 100*l.*, the mortgagee would for that reason be entitled to keep the new lease for himself. The sum of 100*l.* which I mentioned produced a negative answer. I then increased the sum to 1000*l.* and 3000*l.*, and then it was said that once the sum became of importance different considerations might apply because, if that were not so, hardship would result or might result to a mortgagor. The answer clearly is that, if a mortgagor gives to a mortgagee a security of that character, he must abide by the consequences. It may be unfortunate for him to find that the mortgagee has exercised the option at what may turn out to be an extravagant price and that he can only get back his mortgaged property on payment of that price in addition to the mortgage money, but that is the necessary result of the security which he has chosen to give. If he had wanted to avoid that result he

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could quite easily have done so by excluding the option from the security. If he includes it, both parties must take it for better or for worse with all its consequences. The one thing that is clear is that the mortgagee cannot claim the benefit of his exercise of the option, because he would thereby be obtaining for himself, not a collateral advantage, but something which is the contemplated result and fruit of the very security which he has taken.

I do not find it necessary to refer to the authorities which have been cited to us. It seems to me that, once the facts of this case are analysed and the ordinary principles in regard to mortgage transactions are applied, the answer is necessarily the one which I have given. I should, by way of explanation, perhaps refer to *In re Biss* (1), in which Collins M.R. referred to benefits obtained by persons such as trustees and mortgagees in regard to renewals of leases. In referring to the case of a mortgagee in a rather different class of case, he treats the position as one which should be considered in relation to its particular facts. The class of case which he was considering was not one where the interest of the mortgagee is acquired by the exercise of a right given to him by the mortgage itself, but one where the mortgagee, without having any right by option to do so, acquires some right and the question arises whether in all the circumstances he is entitled to keep it for himself. The observations in that case cannot, in my opinion, be taken as being of any assistance to the decision of the present appeal. I only mention it because, if the distinction between this case and the class of case which the Master of the Rolls was there dealing with is not appreciated, some misapprehension may result.

When the mortgagee issued his summons, he was asking for foreclosure on the basis of the situation as it then stood, and I have no doubt that, if the next day the mortgagor had tendered the principal, interest, and costs and an indemnity, he would have been entitled to have the benefit of the contract resulting from the option assigned to him. It can make no difference if the conveyance has been completed during the pendency of the foreclosure proceedings and before a decree absolute is made. If the option had been exercised after an order for foreclosure absolute the mortgagor would have had no interest because it then would have been exercised by the mortgagee as the absolute owner in law and in equity of the

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(1) [1903] 2 Ch. 40.

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benefit of the option, but the right of the mortgagor to have his security back, together with this particular benefit which arose from it, on payment of the principal, interest, and costs and the proper expenses of the mortgagee, of which the purchase-price is part, prevails down to the very moment of foreclosure absolute. In these circumstances the appellant, in my opinion, is entitled to the relief which he seeks.

Farwell J. did not approach the matter in the way in which I have thought it must be approached. As the lease had never been assigned, but had only been the subject of a legal charge, it may be the true view (it seems to me quite immaterial) that, strictly speaking, the only persons who could exercise the option were the mortgagors themselves. Let me assume that that is so. If the mortgagors had exercised the option they would have been bound to hold it for the benefit of the mortgagee as part of his security, and had they done so, the mortgagee, by appropriate proceedings, could have called on them to transfer to him by way of security the freehold which they had so acquired. Farwell J. laid stress on the fact that the mortgagors did not exercise the option, and he said, without giving any reasons, that the mortgagee was entitled to exercise the option and to retain the benefit of the conveyance, and then that "there is no hardship on the "mortgagors as the result of his acquiring the reversion." With great respect to the learned judge, the question of hardship does not enter into this matter. It may be no hardship on a mortgagor to leave part of the mortgage security in the hands of the mortgagee after redemption, but that does not mean that he is not entitled to get the mortgaged property back on payment of the principal, interest, and costs. The appeal must be allowed.

DU PARCQ L.J. I agree. Mr. Jopling put clearly in his argument the point on which I understood him chiefly to rely, namely, that the option was dead when the freehold of the land was conveyed to the mortgagee because the time had then gone by within which the mortgagors could exercise it and nothing in the way of an option was left which could be redeemed. The mortgagors, he said, had no complaint to make about that because they had at no time been in a financial position to exercise the option. If one looks more closely at the matter it is, I think, hopeless to say that the option is dead. That metaphorical expression might be correct if the option had not been exercised at all. If it had been too late on March 25, 1941, to give notice to exercise the option, the mortgagee could have said: "There is nothing "by way of option that you can redeem because the option "has ceased to exist, and part of the security which I held "has disappeared. It is no fault of mine, but it has gone." In that case he could legitimately say that the option was dead, but in the present case the "benefit of the option," which was assigned, has been reaped, and when the mortgagors come to redeem they are entitled, on making the proper payment, to get that benefit back. To say that the option has been exercised, and, therefore, it is dead, and there is no benefit to give the mortgagors seems to me, with great respect, to be making an answer which on the face of it is inadmissible. I agree, for the reasons which have been given by the Master of the Rolls, that this appeal must be allowed.

Appeal allowed.

Solicitors: *E. M. Tringham, for R. E. Frearson, Skegness; Glover, Scott & Apthorpe-Webb.*

H. C. G.

In re HAWKINS.

KING *v.* HAWKINS.

FARWELL J.
1942
Dec. 9.

Will—Direction for payment—"Stated amount free of income tax"—Rates and other outgoings—Keep of dogs and horses—Finance Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

By Finance Act, 1941, s. 25, sub-s. 1:—"Subject to the "provisions of this section, any provision, however worded, for "the payment, whether periodically or otherwise, of a stated "amount free of income tax . . . . being a provision which— "(*a*) is contained in any . . . . will . . . . and (*b*) was made "before September 3, 1939; and (*c*) has not been varied on or "after that date, shall, as respects payments falling to be made "during any year of assessment, the standard rate of income tax "for which is ten shillings in the pound, have effect as if for the "stated amount there were substituted an amount equal to "twenty twenty-ninths thereof."

FARWELL J.

1942

HAWKINS, *In re.*
KING *v.* HAWKINS.

By his will dated June 13, 1930, a testator directed his trustees out of the rents and profits of his settled freeholds to pay all rates, taxes and outgoings in respect of his house and keep it in good repair and properly insured during the life of his widow. He also directed them to raise and pay to his wife, so long as she and any of his dogs and horses were alive, for the keep of his dogs and horses while living and not given away or otherwise disposed of by her three shillings a week for each dog and fifteen shillings a week for each horse. The payment for the animals was expressed to be clear of all deductions, including death duties and income tax. The testator died on August 12, 1930, and, by this summons, taken out on May 29, 1942, his trustees asked (inter alia) whether the direction for the payment of—(*a*) rates, taxes, outgoings, repairs, and insurance of his house, and (*b*) the annual sums in respect of dogs and horses ought to be reduced under s. 25, sub-s. 1, of the Finance Act, 1941 :—

Held, (1.) that the direction to pay rates, taxes, outgoings, repairs and insurance was not a " provision . . . . for the " payment . . . . of a stated amount " as the amount could be ascertained only when the payments had to be made, and the provision did not come within s. 25, sub-s. 1 ; but (2.) the provision for the keep of dogs and horses was for a " stated amount " although the actual amount payable had to be ascertained by reference to the number of dogs and horses, because three shillings and fifteen shillings a week were definite amounts, and that provision, therefore, came within s. 25, sub-s. 1, with the result that sums payable under it would have to be reduced.

ADJOURNED summons.

The facts appear in the headnote.

Wilfrid Hunt for the trustees.

Timins for the son of the testator.

H. E. Salt for the daughter of the testator. Sect. 25, sub-s. 1, applies to both the provisions. It must be conceded that that for rates, taxes, outgoings, repairs and insurance is impliedly free of tax, but it is reducible under the section as being for an ascertainable amount. In the provision for the upkeep of dogs and horses (which is expressly free of tax) three shillings a week and fifteen shillings a week are definite amounts. In the case of both provisions, therefore, the sums must be reduced in accordance with the section.

J. V. Nesbitt, for the granddaughter of the testator, adopted the last argument.

F. Baden Fuller for the widow. The provision for the upkeep of dogs and horses is not a "stated amount," since the amount payable in each year cannot be ascertained until the number of dogs and horses to be provided for has been ascertained. The section, therefore, does not apply to this provision, and the amount need not be reduced.

Winterbotham for the sistei of the testator.

FARWELL J. The direction to pay rates, taxes, outgoings, repairs and insurance is not a "provision . . . . for the "payment . . . . of a stated amount." The amount can be ascertained in each year, but it must vary according to the repairs executed and other matters, and so it is ascertainable only ultimately, when the payments have to be made. It cannot, therefore, be a "stated" amount within any proper definition of that word and, accordingly, s. 25, sub-s. 1, does not apply. With regard to the provision for the dogs and horses, however, the amount is "stated" because three shillings and fifteen shillings a week are definite amounts, although the actual amount payable has to be ascertained by reference to the number of dogs and horses. That provision, therefore, does come within s. 25, sub-s. 1, and the payments for the animals must be reduced in accordance with that sub-section.

Solicitors: *Langlois, Harding, Tate & Johnson; G. H. H. Richards; Chatterton & Co.; Garrard, Wolfe & Co.*

K. R. A. H.

In re TREDGOLD.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* TREDGOLD.

SIMONDS J.
1942
Nov. 25; Dec. 18.

Administration—Will—Payment of stated amount free of income tax—Annuity—Will made before September 3, 1939*—Codicil confirming will made after that date—Amount of income tax repayable—Finance Act*, 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

A testator, by his will made in 1936, directed his trustees to pay to his widow 500*l.* a year clear of all deductions, whether for income tax or otherwise. In 1941 he made a codicil to his will containing certain administrative directions which did not affect the annuity and concluded: " In all other respects I confirm " such will." The testator died in November, 1941:—

Held, that the confirmation of the will by the codicil was a republication of the will, and made the codicil the document which contained the testator's final testamentary wishes, and

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MIDLAND BANK EXECUTOR AND TRUSTEE CO. *v.* TREDGOLD.

that, therefore, the provision for the payment of the annuity was made after September 3, 1939, the Finance Act, 1941, s. 25, sub-s. 1, did not apply, and the widow was entitled to payment of the annuity free of all income tax.

In re Waring [1942] Ch. 426 distinguished.

ADJOURNED SUMMONS.

By his will, dated March 23, 1936, the testator, Major John Aubrey Temple Tredgold, directed that his trustees should pay to his widow 500*l.* a year clear of all deductions whatever, whether for income tax or any other purpose. On August 20, 1941, he made a codicil to his will whereby he gave certain administrative directions not affecting the annuity and concluded with the words: " In all other respects "I confirm such will." The testator died on November 19, 1941. The question was whether the provision for the payment of the annuity was made before or after September 3, 1939, for the purposes of the Finance Act, 1941, s. 25 (1).

Jopling for the plaintiffs.

Roxburgh K.C. and *Belsham* for the widow. The point which arises in this case was expressly left open by the Court of Appeal in *In re Waring* (2), where a codicil, which was executed after September 3, 1939, did not confirm the will which was made before that date. In this case the codicil does confirm the will, and it is submitted s. 25, sub-s. 1, of the Finance Act, 1941, does not apply because the provision for the payment of the annuity is made by the last instrument, namely, the codicil of August 23, 1941. The exact point raised here recently came before the Vice-Chancellor of the Palatine Court of Lancaster in *In re Tabb* (3), and he held that the Act did not apply. The question is one of construction, and it is not necessarily affected by the doctrine of republication which is dealt with by s. 34 of the Wills Act,

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(1) By Finance Act, 1941, s. 25, sub-s. 1: "Any provision, however "worded, for the payment, whether "periodically or otherwise, of a "stated amount free of income tax ". . . . being a provision which— "(*a*) is contained . . . . in any will "or codicil . . . . and (*b*) was "made before September 3, 1939; "and (*c*) has not been varied on "or after that date, shall, as "respects payments falling to be "made during any year of assess- "ment, the standard rate of "income tax for which is 10*s.* in "the £, have effect as if for the "stated amount there were sub- "stituted an amount equal to "twenty twenty-ninths thereof."

(2) [1942] Ch. 426, 431.

(3) (1942) 92 L. J. Newsp. 94.

1937, but existed long before that Act. In *In re Elcom* (1), where the question was whether the will was made before or after Malins' Act (2) came into force, Lindley L.J. said that it was quite immaterial that the testatrix did not in terms republish her will when she made a codicil. A testator may, in effect, say in a codicil: "I have read s. 25, sub-s. 1, of the "Finance Act, 1941, and I still confirm my will." In the present case the will and the codicil must be read together, and it follows that the date on which the provision for the payment of the annuity was made was that of the execution of the codicil. [They referred to *In re Rayer* (3); *In re Fraser* (4); *In re Reeves* (5); and *In re Warren* (6).]

C. D. Myles for the residuary legatees. The question is one of construction, not of the will or the codicil, but of s. 25, sub-s. 1, of the Finance Act, 1941. It is not: "When was "the will made?" It is: "When was the provision made?" The provision was made by the testator's will and that was executed before September 3, 1939, and the fact that the will was subsequently confirmed by the codicil is immaterial. If the doctrine of the republication of a will applies, whether the codicil expressly confirms the will or not, as I submit it does, then the present case cannot be distinguished from *In re Waring* (7). Any codicil which does not expressly revoke a will confirms it, except to such extent as it may vary the will and express confirmation is unnecessary; but a codicil does not do more than recognize the existence of the will which it alters and otherwise confirms. In *Rolfe* v. *Perry* (8), Lord Westbury L.C. held that a will made before the date fixed for the commencement of Locke King's Act (17 & 18 Vict. c. 113) was "already made" within the Act, and declined to apply any doctrine of republication by a second will. [He also referred to *In re Smith* (9); *Barnes* v. *Crowe* (10); and *Pigott* v. *Waller* (11).]

Cur. adv. vult.

1942. Dec. 18. SIMONDS J. read a judgment, in which he stated the facts, read s. 25, sub-s. 1, of the Finance Act, 1941,

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(1) [1894] 1 Ch. 303, 312.
(2) 20 & 21 Vict. c. 57.
(3) [1903] 1 Ch. 685.
(4) [1904] 1 Ch. 726.
(5) [1928] Ch. 351.
(6) [1932] 1 Ch. 42.
(7) [1942] Ch. 426.
(8) (1863) 3 De G. J. & S. 481.
(9) (1890) 45 Ch. D. 632.
(10) (1792) 1 Ves. 486; 4 Bro. C. C. 2.
(11) (1802) 7 Ves. 98.

SIMONDS J.

1942

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and continued: The question is whether the sub-section which I have read covers the present case, so that the widow's annuity is to be paid to her free from income tax only to the degree permitted thereby. In other words, is the provision of her annuity a provision which (*a*) is contained in a will or codicil; (*b*) was made before September 3, 1939; and (*c*) has not been varied after that date. Clearly the provision satisfies the first condition. It is contained in a will or codicil. It satisfies also the third condition, for, whether it was made before or after September 3, 1939, it was not varied after that date. The question is whether it was made before or after September 3, 1939.

In *In re Waring* (1), where the relevant facts were (*a*) a will providing an annuity dated before September 3, 1939, and (*b*) a codicil made after that date, which, though it contained no confirmatory clause, yet had in law the effect of republishing the will, it was decided that the provision was made before September 3, 1939, so that the Act applied, but the Court of Appeal expressly left open for further consideration and decision what would be the result if the codicil contained a confirmatory clause. It was contended before me that, though this question was thus left open, the answer to it was really involved in that decision in *In re Waring* (1), for it was urged that, if a codicil has the effect of republishing a will, it is immaterial whether or not it contains a confirmatory clause, and, the result in either event being the same, the decision governs equally the case where the codicil, containing no confirmatory clause, yet has in law the effect of republishing a will and the case where it has such a clause. I cannot so easily dispose of this case. It may well be that for most purposes the result is the same for the beneficiary whether or not there is a confirmatory clause in the codicil, so long as there is in one way or another a republication of the will, but the presence or absence of such a clause may, as the Court of Appeal clearly thought, be material in determining by what document or documents the provision is made.

To clear the path I must say a few words about republication of wills. Generally it may be said that a republication of a will takes place when it is re-executed or confirmed in such a way as to acquire some force or efficiency which it did not previously possess. Specifically and more commonly the expression is used, as it was used by Lord Greene M.R. in

(1) [1942] Ch. 426.

In re Waring (1), to indicate what is sometimes called constructive republication, which takes place where a testator makes a codicil or executes some testamentary instrument from which the inference can be drawn that he wishes it to be read as part of his will: see Jarman, 7th ed., vol. i., p. 154. If a testator thus shows that he wishes his codicil to be read as part of his will, it follows that he is re-asserting his testamentary intention. He is republishing his will, and, by a somewhat artificial doctrine, the result of such republication is that for certain purposes the will must be construed and take effect as if it had been executed at the date of republication: see Sir William Grant's exposition of the law in *Pigott* v. *Waller* (2). But the republication of a will did not always and for all purposes have this effect. Whether it did so or not was a question of construction: see, for example, *Doe* v. *Walker* (3), where for this purpose great importance was attached to the words: "In all other respects I ratify and "confirm my said will."

The important point for the purpose of the present case is that, whether or not the inference of republication of a will is to be drawn from a codicil, it is impossible to say that a provision which is found in the will alone can inferentially or notionally or by any means be imported into the codicil, unless the codicil itself contains words which express the testator's testamentary intentions. The last words I have read state, I think, the real problem which I have to solve. If the effect of the confirmatory clause is the same as that of any constructive republication, that is, that the will is to be construed and take effect as if it had been re-executed on the date of the codicil, it is clearly impossible to say that the provision is, for the purpose of s. 25, sub-s. 1, of the Finance Act, 1941, made, not in the will, but in the codicil. The provision was, in fact, made by the will and the will was, in fact, made before September 3, 1939, however much it may for certain purposes be construed as if it had been re-executed at a later date. If, on the other hand, the true meaning of a confirmatory clause is that it is to be read as if the testator had written out anew in the codicil itself the words of his will with such alterations as were therein contained, it can, I think, be said that the provision is contained in the codicil, for the testator is there in his codicil expressing in shorthand his testamentary intentions. The codicil is the final expression of his whole will.

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(1) [1942] Ch. 426.
(2) 7 Ves. 98, 117.
(3) (1844) 12 M. & W. 591.

I must, then, turn to the authorities to find what guidance I may, observing, however, that the question which I have to consider was in none of them the real question for decision. In *Anderson* v. *Anderson* (1), the testatrix gave a share of her residuary estate to B., whose wife was one of the attesting witnesses. The bequest to B. under the will was, therefore, void. The testatrix made a codicil, by which, after giving certain directions not touching this bequest, she confirmed her will in other respects. B.'s wife did not attest this codicil. It was held by Bacon V.-C. that the codicil had the effect of republishing and incorporating the will so as to render the gift to B. valid. The important words are "incorporating the "will." They are thus expanded by the Vice-Chancellor (2): "Suppose that, by the codicil, she had said: 'I am aware "'that my will is so erroneously attested that my son's legacy "'will be forfeited, and, to prevent that, I execute this codicil, "'and do thereby confirm my will.' There can be no doubt "that she was competent to do this up to the latest moment "of her life. I am of opinion that she has done this by the "duly executed codicil; that the whole contents of the "previously existing will were incorporated in the codicil." This, the first of the cases that I cite, has never, I believe, been the subject of adverse comment and affords the nearest analogy to my present problem.

In *In re Blackburn* (3) the facts were that under an antenuptial settlement the survivor of husband and wife had, after the decease of the other of them, a testamentary power of appointment among their children. During the life of the wife, the husband made a will containing a residuary devise and bequest in favour of his children of all property which he might be possessed of or over which he might have power of bequest or disposal at the time of his death. After the death of his wife he made a codicil confirming his will. It was held by North J. that, though he could not exercise the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will and the power had been duly exercised. North J. said (4): "But I think the codicil had "the effect of repeating the will, and making it as good and "effectual as if it had been executed for the first time after

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(1) (1872) L. R. 13 Eq. 381.
(2) Ibid. 387.
(3) (1889) 43 Ch. D. 75.
(4) Ibid. 78.

"the death of the wife. In other words, the codicil has the "same effect as if the very words of the will were repeated "in it." Here, I think, is strong support for the view that it is the codicil with its confirmatory clause which contains the testator's testamentary disposition. In *In re Champion* (1) North J., again discussing a confirmatory clause, said (1): "It is settled by authority that the effect of such a phrase as "'I confirm my will in other respects' is a republication of "the will, and when, under the old law, a testator had made a "will which would merely pass the property he had at the "date of it, and then by a codicil he confirmed and republished "his will, the effect was to bring down the date of the will "to the date of the codicil, and to make the devise in the will "operate in the same way in which it would have operated "if the words of the will had been contained in the codicil of "later date." It may fairly be observed that North J. is there discussing the result of republication generally rather than of a confirmatory clause in particular. His decision was affirmed on appeal. In *In re Rayer* (2) a testator by a will made in 1882 gave certain annuities in succession, charging them on real estate and directing that they should be paid without any deduction except for legacy duty and income tax. By a codicil made after the passing of the Customs and Inland Revenue Act, 1888, he made certain immaterial dispositions and in all other respects confirmed his will. By that Act legacy duty was abolished and succession and other duties substituted for it in respect of such annuities. The testator died in 1892. An annuitant died in 1900 and thereupon certain reversionary annuities became payable on which succession duty and additional estate duty were exigible. The question arose who was liable to pay them? Farwell J. cites the passage that I have already quoted from the judgment of North J. in *In re Champion* (3) and proceeds (4): "Therefore "I have, I apprehend, to treat this case as though there had "been simply a devise after the Act of these rent-charges or "annuities with a direction in the words that I have read "that they are to be paid without any deduction except "legacy duty." Then he says (5): "but the joint effect of "will and codicil is that I have a document directing payment "of a rent-charge 'without any deduction except legacy duty,'

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(1) [1893] 1 Ch. 101, 109.
(2) [1903] 1 Ch. 685.
(3) [1893] 1 Ch. 101.
(4) [1903] 1 Ch. 688.
(5) Ibid. 689.

"made at a time when there was no duty called by that name, "but another duty, recently substituted for it, called succession "duty." He decided that "legacy" must be regarded as falsa demonstratio and that the rent-charges were subject to deduction of succession duty. It may be that Farwell J. would have reached the same conclusion if, without an express confirmatory clause, there had been republication of the will by a codicil, but it is perhaps significant that he regarded the will and codicil as "a document" executed at the date of the codicil. In *In re Fraser* (1), where a testator made a will and numerous codicils by the last of which he expressly confirmed his will as altered by prior codicils, Stirling L.J., delivering the judgment of the Court of Appeal, said (2): "The effect of this is to bring the will down to the date of the "codicil, and effect the same disposition of the testator's "estate as if the testator had at that date made a new will, "containing the same dispositions as the original will, but with "the alterations introduced by the various codicils." The same observation may perhaps be made—that the mind of the court was not directed to the question whether the result of a confirmatory clause is that the will is incorporated in the codicil or that the will is to be regarded as re-executed at the date of the codicil. *In re Hardyman* (3) is interesting only because, though there the codicil appears to have contained no confirmatory clause, Romer J. relied on some of the authorities to which I have referred as stating generally the result of republication of a will by a codicil. It throws no light on my problem. In *In re Reeves* (4), where there was a confirmatory clause, Russell J. after an examination of the authorities (including *In re Hardyman* (3), which he does not differentiate) concludes: "If I follow the principle laid down "in *In re Champion* (5) and *In re Fraser* (1) and applied in *In "re Smith* (6) and *In re Hardyman* (3) and read this will and "codicil as one document dated February 10, 1926, the date "of the execution of the codicil, there is a bequest in favour "of his daughter of 'my present lease,' the present lease being "that dated December 31, 1923." That principle the learned judge followed and applied. It remains only to refer to *In re Elcom* (7), to which reference was made in *In re Waring* (8).

(1) [1904] 1 Ch. 726.
(2) Ibid. 734.
(3) [1925] Ch. 287.
(4) [1928] Ch. 351.
(5) [1893] 1 Ch. 101.
(6) [1916] 1 Ch. 523.
(7) [1894] 1 Ch. 303.
(8) [1942] Ch. 426.

There the question was whether an assignor became entitled to certain property under an instrument made after December 31, 1857, her title in fact arising under a will made before that date by a testatrix, who, after that date, made a codicil which republished the will, and died in 1886. The codicil had no confirmatory clause, and the case is, therefore, no authority on the meaning and effect of such a clause. Reliance was, however, placed on certain dicta, first by Chitty J. (1): "The codicil is expressed to be a codicil to her last will and "testament. It does not in terms confirm her will, but, as "was admitted on both sides in the argument, nothing turns "on that circumstance." Lindley L.J. (2) in the Court of Appeal, said: "She did not in terms republish her will; but "that, in my judgment, is quite immaterial." It is, I think, well arguable that these observations are not so much directed to the effect of a confirmatory clause in a codicil as to the general doctrine of republication and amount to no more than a re-assertion of the well-established principle that, with or without express confirmation, there can be constructive republication, but, however this may be, I am free to form my own judgment on the matter before me.

The conclusion to which I come is that the presence of a confirmatory clause distinguishes the present case from *In re Waring* (3), and that here the provision of the widow's annuity was made, not before, but after September 3, 1939, or, in other words, it was contained in a document, the codicil, which was made after that date, or, if not, was made in two documents, the will and the codicil, which are to be regarded as one document made at the date of the codicil. In coming to this conclusion I get some assistance from *Anderson* v. *Anderson* (4), and *In re Blackburn* (5). Just as the testator in the former case, to avert the ill consequences of the Wills Act, confirmed her will by a duly executed codicil, so here the testator, by a codicil executed after September 3, 1939, confirming his will made before that date, averted the consequences attaching to documents made before that date, and, just as in *In re Blackburn* (5), the codicil was to be read "as if the very words of the will were repeated in it," so here the codicil is to be similarly read. If they are so read, the provision of the annuity is contained in the codicil. I am

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(1) [1894] 1 Ch. 307.

(2) Ibid. 312.

(3) [1942] Ch. 426.

(4) L. R. 13 Eq. 381.

(5) 43 Ch. D. 75, 78.

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conscious that the distinction is a fine one, but it is, I think, a real one. A testator, by using such words as "I confirm "my will in other respects," is giving formal expression to his testamentary wishes. The fact that he makes a codicil shows that he is reviewing his testamentary dispositions and, reviewing them, he in effect says: "This and this I want to "alter. This and this I want to stand." He is there and then stating by reference to an existing and identifiable document his last and final wishes. He is in fact making his last will. If, as here, it is made after September 3, 1939, the statute has no application.

Solicitors: *Playne & Co.*; *Peacock & Goddard.*

H. L. L.

LORD CLAUSON
1942
Dec 8.

DISTRICT BANK, LIMITED *v.* LUIGI GRILL, LIMITED, AND OTHERS.

Mortgage—Security—Non-disclosure of material information—Action against solicitor—Absence of intent to defraud—Competence—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 183, *sub-s.* 2.

In the absence of proof of intent to defraud, no action will lie at the suit of a mortgagee under s. 183, sub-s. 2, of the Law of Property Act, 1925, against the mortgagor or his solicitor for failing to disclose any instrument or incumbrance material to the title.

ACTION tried by Lord Clauson, sitting as an additional judge of the Chancery Division.

Certain premises were held by the lessors, Fifty Five Jermyn Street, Ld., under a Crown lease, dated October 5, 1926, for eighty years from January 5, 1924. By a lease, dated September 14, 1936, the lessors granted to Luigi Grill, Ld., a restaurant company, a lease of part of the premises for thirty-five years from September 29, 1936, and, in the same month, an arrangement was made by which that company paid to them 4950*l.* by way of rent in advance for the first three years. The lessors paid 400*l.* to the firm of solicitors who had acted for them in the matter, and the solicitors paid this 400*l.* to the agents of the restaurant company as agreed discount in respect of the payment of three years' rent in advance. In 1937, District Bank, Ld., was in negotiation with the lessors for security for an overdraft on the lessors' banking account, and on August 10, 1937, the lessors executed a charge on the lease to secure their overdraft in favour of the bank. In the course of these negotiations the solicitors, in deducing the lessors' title to the property, failed to disclose to the bank the arrangement for prepayment of rent. On December 22, 1938, the bank appointed a receiver of the rents and income of all the property comprised in the charge, and discovered through him that the arrangement for prepayment had been entered into. The bank, being unable, as a result of that arrangement, to collect any rent from the lessees for the four quarters ending December 25, 1938, March 25, 1939, June 24, 1939, and September 29, 1939, and further rent to November 30, 1939, began an action against the restaurant company for a declaration, immaterial for the purpose of this report, and against the solicitors, for damages under s. 183, sub-s. 2, of the Law of Property Act, 1925 (1), in respect of rent lost to them and for other relief. They made no allegations of fraud against the solicitors and the argument was confined to the question whether in the absence of fraud any action lay under that section.

Wallington K.C. and *G. D. Johnston* for the bank. It was the duty of the solicitors to disclose the arrangement for prepayment of rent. There was an incumbrance and they concealed it, and so the bank can maintain an action under s. 183, sub-s. 2, of the Law of Property Act, 1925. Sect. 183 closely resembles s. 24 of the Law of Property Amendment

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(1) By Law of Property Act, 1925, s. 183, sub-s. 1: "Any "person disposing of property or "any interest therein for money "or money's worth to a purchaser, "or the solicitor or other agent of "such person, who—(*a*) conceals "from the purchaser any instru-"ment or incumbrance material to "the title; or (*b*) falsifies any "pedigree upon which the title "may depend in order to induce "the purchaser to accept the title "offered or produced; with intent "in any of such cases to defraud, "is guilty of a misdemeanour "punishable by fine, or by im-"prisonment for a term not "exceeding two years, or by both."

By sub-s. 2: "Any such person "or his solicitor or agent is also "liable to an action for damages "by the purchaser or the persons "deriving title under him for any "loss sustained by reason of— "(*a*) the concealment of the "instrument or incumbrance; or "(*b*) any claim made by a person "under such pedigree whose right "was concealed by such falsifica-"tion as aforesaid."

Act, 1859, but it is different in form from that section and a change in the law results. Sect. 24 of the Act of 1859 is one long section, whereas s. 183 is split into sub-sections, so that, although fraud is a necessary element in sub-s. 1, it is not a necessary element in proceedings instituted under sub-s. 2. There must be some object in the division of the later enactment into sub-sections, and that object is to place a higher responsibility on solicitors in determining the materiality of muniments of title. [They referred to Williams on Vendor and Purchaser, 4th ed., vol. i., pp. 48, 127, and *Ford* v. *Hill* (1).]

Roxburgh K.C. and *A. C. Nesbitt*, for the solicitors, were not called on to argue.

LORD CLAUSON. The bank bring this action against the solicitors on the footing that under s. 183, sub-s. 2, of the Law of Property Act, 1925, the solicitors are liable in damages for the loss which the bank allege they have suffered by taking an insufficient security. The solicitors contend that an action against them for damages at the suit of the bank is not competent. It is admitted that the bank have no right of action unless it is given to them by s. 183, sub-s. 2. The bank do not allege any intent to defraud, and I am, therefore, treating the case on that footing; so the question is whether the action can be brought under the sub-section, where there is a complete absence on the part of the defendants of any intent to defraud. I would point out that s. 183 speaks of " any person disposing of property . . . . to "a purchaser," and prima facie the section refers, no doubt, to transactions between vendor and purchaser, but it was admitted by Mr. Roxburgh, and I do not think there is any doubt, that a " person disposing of property " would include a mortgagor and a " purchaser " would include a mortgagee within the meaning of the section.

Before 1926 the matter was governed by s. 24 of the Law of Property Amendment Act, 1859. That section combines in one long sentence, after the manner of the draftsmanship of that period, that which appears to be dealt with in the various sub-sections of s. 183 of the Act of 1925. The material words of the section are: "Any seller or mortgagor of land . . . . or "the solicitor or agent of any such seller or mortgagor, who "shall after the passing of this Act conceal any . . . . incumbrance

(1) (1879) 10 Ch. D. 365, 369.

"from the purchaser . . . . in order to induce him to accept the "title offered or produced to him, with intent in any of such "cases to defraud, shall be guilty of a misdemeanor, and "being found guilty shall be liable [to various punishments], "and shall also be liable to an action for damages at the suit "of the purchaser or mortgagee, or those claiming under the "purchaser or mortgagee, for any loss sustained by them or "either or any of them in consequence of the . . . . incumbrance so concealed . . . ." It was not disputed that, as the law stood under that section, there was no cause of action in a civil court unless the concealment had been made with intent to defraud, but it has been suggested that the difference in drafting between that section and s. 183 of the Act of 1925 is such that it must be held that, on the true construction of s. 183, a civil cause of action is given, even though there is no intent to defraud and that the law is altered to that extent by the Act of 1925.

I have come to the conclusion that the law under this section is just as it was under the earlier section and that no civil action lies in respect of a concealment unless it was made with intent to defraud. Sub-s. 1 of s. 183 deals only with criminal proceedings and there is no question that it would be necessary for the prosecution in such proceedings to prove, not only concealment, but also intent to defraud, and, as I read sub-s. 2, nearly every word of it refers me back to sub-s. 1. In my view, the words "any such person" in sub-s. 2, point to the person, described in sub-s. 1, who is disposing of property and conceals from the purchaser a material incumbrance with intent to defraud. He must be a fraudulent person. Furthermore, the words "Any such person or his "solicitor or agent is also liable to an action for damages" surely mean that the man who, by reason of his fraudulent concealment, is liable to prosecution is made liable to something else, namely, a civil action. Nor does it stop there, because the sub-section goes on: ". . . . liable to an action for "damages by the purchaser . . . . for any loss sustained by "reason of—(*a*) the concealment of the instrument or incum-"brance; or (*b*) any claim made by a person under such "pedigree whose right was concealed by such falsification "as aforesaid." Those words throw me back to the concealment and the falsification mentioned in sub-s. 1, which are a fraudulent concealment and a fraudulent falsification.

The conclusion to which I come, therefore, is that, unless an intent to defraud is proved, a civil action brought under s. 183, sub-s. 2, must fail. There is no suggestion of fraud made here, and so the action must fail.

Solicitors: *Wetherfield, Baines & Baines; Peacock & Goddard.*

J. L. D.

SIMONDS J.
1942
Dec. 9, 18.

In re WATFORD CORPORATION'S AND A. S. WARE'S CONTRACT.

Emergency legislation—Vendor and purchaser—Sale of land—War damage contribution—Payment of purchase price by instalments—Liability of vendor—War Damage Act, 1941 (4 & 5 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 1 (*a*).

On October 19, 1927, a vendor entered into a contract with a purchaser for the sale to him of certain freehold property of which he went into possession, the purchase price being payable by twenty-five equal annual instalments, the last of which was payable in 1952. A summons was taken out by the purchaser for a declaration that he was not liable to pay or indemnify the vendor against any part of the contributions which the vendor was liable to pay in respect of the property under the War Damage Act, 1941:—

Held, that the vendor, being primarily liable as the owner of the only proprietary interest in the property at the relevant date and having paid the contributions under the Act, was not entitled to recoupment by the purchaser as neither the statute, nor the contract, nor any general principle of equity, gave the vendor any such right of recoupment.

In re Jacobs' and Stedman's Contract [1942] Ch. 400, considered.

ADJOURNED SUMMONS.

On October 19, 1927, the vendors, Watford Corporation, entered into a contract with the purchaser, A. S. Ware, for the sale to him of certain freehold property, known as 57 The Harebreaks, Watford. The purchase price was 750*l.*, of which the purchaser paid 50*l.* as a deposit and then went into possession, the balance being payable by twenty-five equal annual instalments, the last of which was payable in 1952. This summons was taken out by the purchaser for a declaration that he was not liable to pay or indemnify the vendors against any part of the contributions which they were liable to pay under the War Damage Act, 1941, in respect of the property comprised in the contract. The property was a "contributory "property" under s. 19 of the Act, and it was common ground that there was only one proprietary interest in the property at the relevant date and that the vendors were the owners of that interest, and, therefore, primarily liable to make the payment (1).

Jopling, for the purchaser. This case is covered by *In re Jacobs' and Stedman's Contract* (2), although the facts are different. There an instalment of war damage contribution was held not to be apportionable between vendor and purchaser as an " outgoing " in conditions of sale, and here there is no question of outgoings, but the principle is the same. A vendor who sold property in January would be liable to pay the whole of the contribution due in July, although he had no interest in the property. Here the rights and liabilities of the parties are determined by the contract and that document contains no general provision for the payment of this contribution. Moreover, the vendor has a lien on the property, and, even if he were not a direct contributor, he would be liable to contribute to the direct contributor on account of his lien. War damage contribution is taxation of a personal kind.

Raymond Jennings for the vendors. It is not disputed that the person primarily liable to pay this tax is the vendor because the vendor is the owner of the only proprietary interest. The purchaser has, however, been in possession since 1927, and under the ordinary relation between vendor and purchaser the vendors are constructive trustees for the purchaser and are entitled to be indemnified by the purchaser in respect of these payments. [He referred to Williams on Vendor and Purchaser, 4th ed., vol. i., p. 563.] *In re Jacobs' and Stedman's Contract* (2) has very little bearing on the matter. The term " outgoings " is a word of wide import and cannot be limited to payments which are not of a capital nature. [He referred to Halsbury's Laws of England, 2nd ed.,

(1) By War Damage Act, 1941, s. 23, sub-s 1: " An instalment "of contribution becoming due " in any year in respect of any " contributory property shall, save " as otherwise provided in this " Part of this Act—(*a*) if there " is at the relevant date only one " proprietary interest subsisting " in the whole of that property, be " payable by the owner at that " date of that interest."

(2) [1942] Ch. 400.

vol. xxix., p. 299, para. 394, and to *Barsht* v. *Tagg* (1) ; *Tubbs* v. *Wynne* (2) ; *Lysaght* v. *Edwards* (3).] After a contract has been entered into, the relation between the vendor and purchaser being that of trustee and cestui que trust, a purchaser, when he enters into possession, is liable for the outgoings. There is nothing in this contract which constrains the court to find that the vendors have not the ordinary rights of vendors, and there is nothing in the Act which prevents the purchaser being ultimately liable for contribution. It is not suggested that any apportionment is possible. This is a question of indemnity under conditions entirely different from those in *In re Jacobs' and Stedman's Contract* (4).

Jopling replied.

Cur. adv. vult.

1942. Dec. 18. SIMONDS J. referred to ss. 1, 2, 3, 4, 9, 19, 20 and 23 of the War Damage Act, 1941, and continued: It is common ground between the parties that the owners of the only proprietary interest at the relevant date were the vendors, and the vendors were, therefore, primarily liable to pay the instalments of contribution. I am told that the payment was in fact made by the purchaser, who was in possession, but it is conceded that, if he did make that payment, it was as agent for the vendors, and I deal with this case on the footing that the vendors made the payment. There is only one other section to which I need refer. Sect. 46, sub-s. 3, provides: "Where a hereditament sustains war "damage at a time when an interest therein is the subject "of a contract of sale or of a notice to treat served under "an enactment authorising the compulsory acquisition thereof, "any value payment in respect of the damage, or share "of such a payment, or payment under s. 15 of this Act, "payable to the vendor in respect of that interest, shall, "unless the contract is rescinded or the notice ceases to "have effect, be held by him upon trust for the purchaser: "provided that any lien upon that interest to which the "vendor is entitled by virtue of the contract shall extend to "that payment or share." That presumably refers to the vendor's lien, although it may be said that the vendor's lien arises not so much by virtue of the contract as by virtue of the general equity.

(1) [1900] 1 Ch. 231.
(2) [1897] 1 Q. B. 74.
(3) (1876) 2 Ch. D. 499, 505.
(4) [1942] Ch. 400.

SIMONDS J.

1942

WATFORD CORPORATION'S AND A. S. WARE'S CONTRACT, *In re.*

I have to consider whether the vendors, having, as they were bound to do, made the payment, are entitled to recoupment from the purchaser. That right can only arise in one of three ways. It must be provided by the statute or by the contract, or it must arise under some general principle of equity.

First, it is clear that, although the Act provides for many contingencies, it does not provide for recoupment by the purchaser to the vendor of contribution paid by the vendor. It is, perhaps, noticeable that, while s. 46, sub-s. 3, specifically provides that, as between vendor and purchaser, the vendor shall hold the value payment, if made to him, on trust for the purchaser, subject to his lien, there is no complementary provision for indemnity by the purchaser in respect of the contribution which the vendor has made. Secondly, it is clear that there is no right of recoupment under the contract, which, while making express provision in regard to foreseen expenditure, does not provide in general terms for any unforeseen expenditure. Thirdly, I know of no equitable principle which enables a vendor independently of any statutory provision or contractual right, to recover from a purchaser, even if he has gone into possession, a payment which he (the vendor) has made under a statutory liability arising before the time fixed for completion. It is commonly said (see Williams on Vendor and Purchaser, 4th ed., vol. i., p. 545) that in the interval between contract and conveyance the property sold belongs in equity to the purchaser. So it does, and the vendor is, therefore, during that time constructively a trustee for him, but this statement must not be pressed so far as to give to the vendor all the rights of indemnity to which a trustee in the full sense is entitled from his trust estate, for the vendor has his own personal and substantial interest in the property, which he is entitled to protect, and it is, in my judgment, impossible to concede to him, in respect of payments made by him, whether voluntarily or, as this payment was made, compulsorily, the right of indemnity which an ordinary trustee can claim. This is a payment which might in certain circumstances enure for the vendors' own benefit, as, for example, if the purchaser made default in completion and the contract was rescinded. The result is that neither the statute nor the contract nor any general principle of equity gives the vendor a right of recoupment from the purchaser and, accordingly, this application succeeds.

SIMONDS J.
1942
WATFORD CORPORATION'S AND A. S. WARE'S CONTRACT, *In re.*

The decision of Farwell J. in *In re Jacobs' and Stedman's Contract* (1), does not exactly cover the point, for he had only to consider whether there should be an apportionment of the contribution made under the Act on the footing that it was an " outgoing " within the meaning of certain conditions of sale. He decided against apportionment on that footing, but, if there is a general equity to indemnity, I do not see why that should not be equally the case whether the claim is in respect of the whole or of an apportioned part. It was not, however, in that case suggested to the court that any such equity existed.

Solicitors : *Shaen, Roscoe & Co. ; Town Clerk, Watford.*

J. L. D.

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(1) [1942] Ch. 400.

BENNETT J.
1942
Oct. 27, 28 ;
Dec. 21.

ATTORNEY-GENERAL *v.* LEICESTER CORPORATION.

Local government—Corporation—Purchase of omnibus business—Payment out of general rate fund—Power to use reserve funds for purchase—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 101, *sub-s.* 1 ; *s.* 103—*Local Government Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 185, *sub-s.* 1—*Leicester Corporation Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* clxxxiv.), *s.* 45, *sub-s.* 2 (*b*) ; *s.* 47, *sub-s.* 3.

The borough of L., which was incorporated by royal charters in 1589 and 1599, possessed powers under private Acts to operate tramways and motor omnibuses within the city boundaries and on three specified routes outside. In 1939 the corporation entered into a contract to purchase the goodwill and stock of J. H., an omnibus proprietor operating another route outside the city, subject to the consent of the regional traffic commissioners and to the grant to the corporation of the appropriate road service licence. The Minister of Transport having refused his consent to a loan for this purchase, the corporation resolved to pay for it out of their reserve funds. In an action brought at the relation of a company operating a motor omnibus service on the same route, claiming a declaration that the purchase was ultra vires and void :—

Held, that, the restriction on the objects on which a municipal corporation could spend its general rate fund which was imposed by s. 140 of the Municipal Corporations Act, 1882, having been removed by the repeal of sub-ss. 2, 3 and 4 of that section by the Local Government Act, 1933, the corporation were entitled to purchase the business of J. H. out of their rate fund.

But, *held*, further, that the corporation had no power under their private Acts, which limited the objects on which their reserve funds could be expended, to pay the purchase money out of their tramway undertaking reserve fund.

ACTION.

The relators, the Birmingham and Midland Motor Omnibus Co., Ld., who were ratepayers of the city of Leicester, operated a number of omnibus services between the city and places outside it, and, particularly, two services between Leicester and Newtown Linford, under road service licences granted by the East Midland Traffic Commissioners under the Road Traffic Act, 1930, modified by permits given by the Regional Transport Commissioner in 1940 under emergency legislation. J. H. Hutton also operated a service of motor omnibuses between Leicester and Newtown Linford, under a road service licence and a permit issued by the Regional Transport Commissioner over routes identical with the relators' routes, one of which passed Bradgate Park, a public park belonging to the corporation. The corporation of Leicester was incorporated by royal charters of 1589 and 1599, and had power to operate motor omnibus services under the Leicester Corporation Acts, 1902, 1913, and 1930. Except in respect of three specified routes these powers were expressly limited to the running of motor omnibuses within the boundaries of the city of Leicester. In July, 1937, the corporation proposed to operate a motor omnibus service between Leicester and Newtown Linford, a distance of 3 miles 1080 yards, being a route other than the three specified routes on which the corporation could operate motor omnibuses outside the city boundaries, and, by an agreement made on February 20, 1939, the corporation contracted with Hutton, subject to certain conditions, including the grant to them of a road service licence, to purchase six omnibuses and the goodwill of his business for 12,714*l*. On February 28, 1939, the corporation resolved to carry this contract into effect, and to apply to the Minister of Transport for his consent to borrow the purchase money, but the Minister refused his consent to a loan. In March, 1939, the council resolved that the purchase money should be paid out of the reserve fund (1), and they applied to the East Midland Traffic Commissioners for their consent, under s. 101 of the Road Traffic Act, 1930, to the running by the corporation of the proposed service and for a road service licence for the service. On April 26, 1939, the relators served notice of their objections on the traffic commissioners. On June 21, 1939, this action was begun against the corporation, claiming (1.) a declaration that the corporation were not entitled to purchase, or carry out the purchase of, the business of J. H. Hutton, and that such purchase was illegal and ultra vires and beyond the powers of the corporation; (2.) an injunction in the terms of this declaration; (3.) a declaration that the corporation were not entitled to use any part of the reserve fund or the general rate fund, or to borrow on the security of such funds for the purpose of purchasing the business; and (4.) an injunction in the terms of this last declaration.

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(1) Which reserve fund was not stated, but Bennett J. assumed that it was the reserve formed for the omnibus undertaking (see p. 92 post).

Craig Henderson K.C. and *H. L. Parker* for the plaintiff. The corporation have no power to purchase out of borough funds a business which, under their private Acts, they have no power to carry on, and in any case, under those Acts, they have no power to use the reserve fund for such a purchase. [They referred to *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, per Lindley L.J. (1).] Sects. 101 and 103 of the Road Traffic Act, 1930 (2), under which the corporation claim to have power to run these omnibuses, must be read together, and so read, the power to purchase and to run the omnibuses is limited to the district of the corporation, that is, the borough of Leicester, and so the corporation cannot run them to Newtown Linford. Under the Road Traffic Act, 1930, no person or body can obtain a road service licence from the traffic commissioners unless they already own the right to run public service vehicles on some other route. The corporation could not obtain that licence without the purchase of Hutton's business.

Charles Romer K.C. and *Stimson* for the corporation. If the corporation cannot buy Hutton's business they cannot purchase any business which competes with their own inside

(1) [1892] 3 Ch. 242, 251.

(2) By Road Traffic Act, 1930, s. 101, sub-s. 1: "A local "authority who under any local "Act or order are operating a "tramway, light railway, trolley "vehicle, or omnibus undertaking, "may as part of that under-"taking run public service vehicles "on any road within their district "and also with the consent of "the traffic commissioners for "the traffic area in which any "other road is situate, on that "road . . . ."

Sect. 103: "For the purposes of "this part of this Act a local "authority may purchase and "maintain such vehicles as may "be necessary . . . ."

the city boundaries. They have statutory powers to run omnibuses inside the city by virtue of the Leicester Corporation Act, 1902, and s. 21, sub-s. 1, of the Leicester Corporation Act, 1913. In addition to these powers, they have power, with the consent of the Midland Traffic Commissioners to run motor omnibuses outside the city, under s. 101 of the Road Traffic Act, 1930, and under s. 103 of that Act they may purchase the omnibuses (1) they propose to run, and the goodwill of this business. A power to take over a business being operated by some other person is reasonably incidental to the ordinary powers of the corporation: see *Deuchar* v. *Gas Light and Coke Co.* (2), and *Attorney-General* v. *Smethwick Corporation* (3). Further, the corporation are expressly authorized by s. 47, sub-s. 3, of the Leicester Corporation Act, 1930, to use the reserve fund for this purchase, for that sub-section entitles them to resort to that fund to extend "any part of "the works" of the undertaking, and that includes extending the undertaking. The reserve fund of the corporation's tramway undertaking may be applied in any way for the benefit of the existing undertaking, and in the opinion of the corporation it is desirable, in order to improve the existing omnibus service, to purchase Hutton's business, and carry on this service. Finally, the powers claimed come within the general powers of the corporation under its charters of 1589 and 1599, which are much greater than those of a corporation created by statute: see *Attorney-General* v. *Manchester Corporation* (4), where the distinction between charter powers and statutory powers is laid down by Farwell J. The powers of charter corporations were definitely limited by s. 140, of the Municipal Corporations Act, 1882, but sub-ss. 2, 3 and 4 of that section were repealed by the Local Government Act, 1933, sch. XI., part 2, and have been replaced by ss. 185 to 187 of that Act. But for s. 140 of the Municipal Corporations Act, 1882, the decisions restraining corporations from spending money on certain objects could not have been given : see *Attorney-General* v. *Leeds Corporation* (5) and *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (6).

Craig Henderson K.C. replied.

Cur. adv. vult.

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(1) See note (2) ante, p. 88.

(2) [1925] A. C. 691, 695.

(3) [1932] 1 Ch. 562.

(4) [1906] 1 Ch. 643, 651.

(5) [1929] 2 Ch. 291, 295.

(6) (1887) 23 Q. B. D. 492.

1942. Dec. 21. BENNETT J. read a judgment in which he stated the facts, and continued: The rights of the parties are mainly governed by the provisions contained in a number of Acts of Parliament. First of all, there are the private Acts of the defendant corporation, conferring on them various powers; next, there is the Road Traffic Act, 1930; and, thirdly, there are provisions in the Municipal Corporations Act, 1882, and the Local Government Act, 1933.

The first of the private Acts to which reference was made was the Leicester Corporation Act, 1897, which conferred miscellaneous powers on the corporation, including a power to work and run tramways within the borough. The next private Act was the Leicester Corporation Act, 1902, which by s. 58 authorized the corporation to provide and run omnibuses within the borough in connexion with the corporation tramways in the manner set out in the section, and also authorized the corporation to provide all necessary plant for those purposes. The powers conferred on the corporation by this Act, which seems to have been passed before motor omnibuses came into general use, were enlarged by s. 21 of the Leicester Corporation Act, 1913, which extends and applies the provisions of the Act of 1902 to the provision and use of motor omnibuses, and, in addition, empowers the corporation to provide and run motor omnibuses along three specified routes outside the city boundary. None of these is the route operated by Mr. Hutton, the goodwill of which is the subject of the agreement of February 20, 1939. The last of the private Acts to which reference was made is the Leicester Corporation Act, 1930. Sect. 3 of this Act is a definition section, and provides that in that Act the expression " the omnibus undertaking " means the omnibus undertaking authorized by the Leicester Corporation Act, 1902, the Leicester Corporation Act, 1913, and the Act of 1930. Part II. of the Act contains a number of provisions relating to the tramways undertaking and the omnibus undertaking, including (in s. 17) provisions in addition and without prejudice to the exercise of their powers under s. 58 of the Act of 1902 and s. 21 of the Act of 1913. By this section the corporation are empowered to provide and maintain and run omnibuses along any routes within the city, with a proviso that the corporation are not to manufacture any part or parts of any omnibuses provided under the Act. These are all the provisions contained in the private Acts of the corporation relating to the running of omnibuses, and they enable the corporation to provide motor omnibus services along any route within the boundaries of the city, and along three specified routes outside the boundaries of the city, and also to provide motor buses for use in such services.

I will now pass to the Road Traffic Act, 1930, which (inter alia) confers power on certain local authorities to provide omnibus services. This Act contains a number of provisions regulating the use of highways by motor vehicles, and, in particular, their use by vehicles which are described in the Act as "public "service vehicles." Public service vehicles are, for the purposes of the Act, divided into two classes, one of which is called "stage carriages," and comprises motor vehicles carrying passengers for hire or reward at separate fares stage by stage. The Act divides England and Scotland into traffic areas, and for each traffic area establishes three traffic commissioners charged with the duty of issuing licences under Part IV. of the Act, that being the part which regulates public service vehicles. Sect. 67, sub-s. 1, of the Act provides that no person shall cause or permit a motor vehicle to be used on any road as a stage carriage unless he is the holder of a public service vehicle licence. Sect. 72, sub-s. 1, provides that the traffic commissioners may grant to any person applying therefor a licence referred to as a road service licence to provide such a road service as may be specified therein. The grant of such a licence is a matter of discretion, and in the exercise of that discretion the commissioners are to have regard to, among other matters, the extent to which the needs of the proposed route are already served, the extent to which the proposed service is necessary or desirable in the public interest, and the needs of the area as a whole in relation to traffic, including the elimination of unnecessary services. The commissioners may attach conditions to a road service licence for securing the safety and convenience of the public, and may fix minimum or maximum fares. A road service licence continues in force for one year from the date on which it is expressed to take effect. Sect. 92, sub-s. 1, declares that nothing in that part of the Act is to be treated as conferring on the holder of any licence granted under that part of the Act any right to the continuance of any benefit arising from the provisions of that part of the Act or from any licence granted thereunder. Part V. of the Act deals with and regulates the running of public service vehicles by local authorities, who are defined in s. 108 as meaning "the council of any county "borough or county district." The relevant provisions in this part of the Act are ss. 101 and 103.

It is quite clear, I think, that until June 1, 1934, when the Local Government Act, 1933, came into operation, unless the sections I have read contained in part 4 of the Leicester Corporation Act, 1930, authorized them so to do, the corporation were forbidden by the Municipal Corporations Act, 1882, to pay to Mr. Hutton the purchase price of the goodwill of his business, because such a payment is not authorized by any of the paragraphs in the fifth schedule to the Act of 1882 (1), and there was no authority to make such a payment in any Act of Parliament. The Local Government Act, 1933, by sch. XI., part 2, repeals a number of sections of the Municipal Corporations Act, 1882, and, in particular, it repeals sub-ss. 2, 3 and 4, of s. 140, and ss. 141 to 144 of the Act. It also repeals part 1 of the fifth schedule, and in part 2, paras. 1, 7, 8, 9, 10, 11 and 12. These provisions are replaced by ss. 185 to 187 of the Local Government Act, 1933 (1). It should be noted that the decision of the council at the date of the issue of the writ was that the money payable to Mr. Hutton under the agreement of February 20, 1939, was to be paid out of the reserve fund. Which reserve fund was not stated in the resolution, but I apprehend it must have been the reserve fund formed for the omnibus undertaking.

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(1) By Municipal Corporations Act, 1882, s. 140, sub-s. 1: "The "borough fund shall be applicable "to and charged with the several "payments specified in the fifth "schedule."

By Local Government Act, 1933, s. 185: "(1.) All receipts "of the council of a borough, "including the rents and profits "of all corporate land, shall be "carried to the general rate fund "of the borough, and all liabilities "falling to be discharged by the "council shall be discharged out "of that fund. (2.) An account, "called the 'general rate fund "'account,' shall be kept of all "receipts carried to, and pay"ments made out of, the general "rate fund: Provided that, where "any such receipts are receipts "for the benefit of a part only "of the borough, or any such "payments are payments in "respect of expenditure with "which a part only of the "borough is chargeable, a separate "account shall be kept of receipts "and payments in respect of that "part of the borough. (3.) If "the general rate fund is more "than sufficient for the purposes "to which it is applicable, the "surplus thereof may be applied "under the direction of the "council for the public benefit "of the inhabitants and improve"ment of the borough."

By s. 187: "(1.) All payments "to and out of the general rate "fund of a borough shall be made "to and by the treasurer."

As I have already stated, and as appears from the agreed statement of facts, the corporation were constituted by royal charter, and it is well settled law that, generally speaking, such a corporation can do anything that an ordinary individual may do. Until the Local Government Act, 1933, came into operation the spending powers of such a corporation were, however, restricted by s. 140 of the Municipal Corporations Act, 1882: see *Attorney-General* v. *Manchester Corporation* (1), and *Attorney-General* v. *Leeds Corporation* (2). In the *Leeds* case Luxmoore J. states the law relating to the powers of a corporation incorporated by royal charter in the following terms (3): "The corporation"—that is the Leeds Corporation —"was incorporated by royal charter in the year 1627 in the "reign of King Charles I. The fact that it is incorporated "by royal charter is of importance, because a corporation so "constituted stands on a different footing from a statutory "corporation, the difference being that the latter species of "corporation can only do such acts as are authorized directly "or indirectly by the statute creating it; whereas the former "can, speaking generally, do anything that an ordinary "individual can do. If, however, the corporation by charter "be, as the corporation is in the present case, a municipal "corporation, then it is subject to the restriction imposed by "the Municipal Corporations Act, 1882, and can be restrained "from applying its funds to purposes not authorized by that "Act." Mr. Craig Henderson, for the plaintiff, rested his case for the first declaration for which the plaintiff asks on the proposition that, on the true construction of the Road Traffic Act, 1930, when local authorities were authorized to run public service vehicles on any road within their district, and also, with the consent of the traffic commissioners, for the traffic area in which any other road is situate on that road, and were given powers by s. 103 to spend money for the purposes therein mentioned, there was to be implied into s. 103 a prohibition against the expenditure of any money on any purpose not mentioned in that section.

The authority on which this argument was advanced was a passage from the judgment of Lindley L.J., in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, where he said (4): "The powers of the company "to regulate the use of the docks, quays, and warehouses,

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(1) [1906] 1 Ch. 643, 651.
(2) [1929] 2 Ch. 291.
(3) Ibid. 295.
(4) [1892] 3 Ch. 242, 250.

"and to make charges for their use, depend partly on the fact "that the company is the owner of them and partly on the "fact that the company's rights as owner are largely governed "by special provisions rendered necessary for the protection "of the public. Subject, however, to the restrictions expressly "or impliedly imposed by statute, the company can exercise "the ordinary rights which are incidental to the ownership "of their docks, quays and warehouses. As owner, the "company could make any regulations it might think proper "for the use of its property; it could charge what it liked and "could shut its docks altogether if people would not comply "with its demands. These powers, however, are not unchecked "by statute. The legislature has expressly conferred upon the "company many powers which the company, as the owner of "property, could have exercised without any express statutory "authority. Whenever this is the case, the powers expressly "given must be treated either as superfluous or as purposely "inserted in order to define, that is, limit the right conferred, "and as implying a prohibition against the exercise of the more "extensive rights which the company might have by virtue of "its ownership of property. That the latter is the true mode "of regarding statutory powers conferred on bodies created "for public purposes and authorized to acquire land for such "purposes cannot, I think, admit of any doubt." The decision in that case has nothing to do with the question which has to be decided in the present case, but the passage I have read was relied on as laying down a general principle of construction applicable to all Acts of Parliament, including therefore the construction of the relevant sections of the Road Traffic Act, 1930. When that Act was passed the Municipal Corporations Act, 1882, was in full operation, and by s. 140 of that Act the corporation were, as I have stated, forbidden to spend any of the borough fund in running public service vehicles outside the city boundary on a route not being one of the three routes described in s. 21 of the Leicester Corporation Act, 1913. The express power, therefore, of expending money conferred on local authorities by s. 103 of the Road Traffic Act, 1930, was not superfluous. It was essential, not only in the case of the defendant corporation, but also in the case of all other local authorities subject to the provisions of the Municipal Corporations Act, 1882. It seems to me to follow that, so long as that Act was in force, there was no need to read into s. 103 of the Road

Traffic Act, 1930, a prohibition against the spending of money on purposes other than those mentioned in that section. The prohibition already existed in s. 140 of the Municipal Corporations Act, 1882, and there was, therefore, no need to invoke Lindley L.J.'s principle of construction.

As I see the matter, so long as s. 140 of the Municipal Corporations Act, 1882, was in force, the defendant corporation were by that section forbidden to make the payments for goodwill for which the impeached agreement calls and would have been restrained by a court of equity in an action brought by the plaintiff from making that payment. Since the repeal of sub-ss. 2, 3 and 4 of that section by the Local Government Act, 1933, the only ban against making that payment has been removed, and the corporation, having power as a corporation incorporated by royal charter to enter into the impeached agreement, are not now prohibited by any Act of Parliament from making the payments. Sect. 185, sub-s. 1, of the Local Government Act, 1933, gives them power to make the payment out of the general rate fund of the borough, and, if the general rate fund is insufficient to enable the liability to be discharged, s. 186 confers on the council of the corporation power to levy a rate to meet it. But the council must decide that the payment is to be made out of the general rate fund. Up to the present time the council does not seem to have so decided. The only resolution of the council dealing with this matter to which my attention was called was the resolution of March 26, 1939, when the council approved and adopted a report of their transport committee that the purchase price payable under the impeached agreement should be paid out of the reserve fund. For these reasons the plaintiff is not, in my judgment, entitled to the first declaration he claims, nor to the injunction claimed in the second prayer of the statement of claim.

The defendant corporation have, however, resolved to discharge their liability to Mr. Hutton out of the reserve fund, and Mr. Romer on their behalf argued that they were entitled to do so. The question whether they are so entitled depends on the meaning of sub-s. 3 of s. 47 of the Leicester Corporation Act, 1930. It was argued that the acquisition of the goodwill of Mr. Hutton's business might benefit the corporation's existing omnibus undertaking, and, therefore, that the price of it could be paid out of the reserve fund. This is a question of fact. I agree that it may be possible for the existing omnibus undertaking to be benefited in some circumstances by the acquisition of the goodwill of another similar undertaking, but this is a matter for evidence. There is no trace of the idea having at any time been in the minds of anyone representing the corporation, and no evidence was called with a view to proving the facts. In my judgment, the corporation have failed to establish any ground on which they can lawfully use the reserve fund of the omnibus undertaking in paying the price of the goodwill of Mr. Hutton's business. Mr. Romer also argued that the corporation were authorized by s. 45, sub-s. 2 (*b*), of the Leicester Corporation Act, 1930, to pay for the goodwill out of the revenue of the tramway undertaking on the ground that, in doing so, they would be applying the revenue of that undertaking for the public benefit of the inhabitants of the city of Leicester. The argument was that it would be for the public benefit of the citizens of Leicester that they should be conveyed to and from Bradgate Park in motor omnibuses belonging to the corporation. This argument was not advanced on proof of any fact, but was grounded on the agreed fact that the corporation are trustees jointly with the county council of this public park. Presumably, adequate and efficient transport service between the city of Leicester and Bradgate Park is already provided by the relators and by Mr. Hutton. If it is not, representations can be made to the traffic commissioners who can deal with the matter. If it is, it is not possible in the absence of some evidence to come to the conclusion that it is for the public benefit of the citizens of Leicester that the corporation should spend over 11,000*l*. of their money so that some of them may have the satisfied feeling of having been conveyed to and from Bradgate Park in a motor omnibus belonging to the corporation.

The declaration which the plaintiff claims by the third paragraph of his statement of claim is, in my judgment, too wide. I will declare that the corporation are not entitled to apply, expend, or use any part of any reserve fund formed by them in respect of any of their undertakings for the purpose of purchasing or carrying out the purchase of the business or the goodwill of the business of J. H. Hutton, and that the use of any reserve fund for such purpose is illegal and ultra vires and beyond the powers of the corporation, and I will give liberty to apply for an injunction. The costs of the corporation should be taxed and the plaintiff should pay one half of the taxed costs.

Solicitors: *Sidney Morse & Co.; Field, Roscoe & Co., for L. J. McEvoy, Town Clerk, Leicester.* H. L. L.

In re THOMPSON AND COTTRELL'S CONTRACT.

UTHWATT J.

1943

Jan. 11.

Vendor and purchaser—Underlease—Sale by underlessee—Title to begin with underlease—Previous disclaimer of head lease by trustee in bankruptcy of underlessor—Title of underlessee—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 54, *sub-ss.* 1, 2.

A contract was concluded for the sale of underleasehold property by the underlessee as vendor, the conditions of sale providing that the underlease should be the root of title. After requisitions had been answered, possession given, and the engrossment of the assignment executed by the vendor as an escrow, the vendor's solicitors disclosed for the first time a disclaimer of the head lease made under s. 54, sub-s. 1, of the Bankruptcy Act, 1914, by the trustee in bankruptcy of the underlessor four years previously. The purchaser's solicitors contended that the vendor had not shown a good title and ought to apply to the court for an order vesting the head lease in herself:—

Held, that the fact that the head lease had been disclaimed before the date of the contract for sale was not an objection to the title and that a good title had been shown.

In re Finley (1888) 21 Q. B. D. 475, considered.

SUMMONS.

A lessee (hereinafter called " the underlessor ") granted to the underlessee an underlease of his leasehold property for ninety-nine years less three days from September 29, 1928. In 1937, the trustee in bankruptcy of the underlessor disclaimed the head lease, which comprised thirteen other plots of land of which underleases had been granted to other persons. On October 15, 1941, the underlessee (hereinafter called " the "vendor ") contracted to sell, and a purchaser to purchase, the property comprised in the underlease, the abstract of title having already been delivered. The conditions of sale provided that the title should commence with the underlease and that completion should be on November 12, 1941. The requisitions were delivered on October 16, possession was given on October 17, and the replies to requisitions were delivered on October 26, 1941. The vendor executed an engrossment of the assignment as an escrow, and, on November 15, 1941, the vendor's solicitors sent to the purchaser's solicitors an apportionment account and also the disclaimer by the trustee in bankruptcy of the underlessor who had since died. The purchaser's solicitors had not previously known of the disclaimer, and they contended that the vendor had not shown a good title to the property comprised in the underlease and ought to perfect her title by

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applying to the court for an order vesting in her the disclaimed head lease. By this summons, taken out under s. 49 and s. 203, sub-s. 5, of the Law of Property Act, 1925, the vendor asked for a declaration that she had sufficiently answered the purchaser's requisitions and objections and had shown a good title to the property.

F. Baden Fuller for the vendor. The title is not defective. The purchaser's objection practically amounts to her calling for the title to the head lease to which she has no right.

Sir Norman Touche for the purchaser. The trustee in bankruptcy of the underlessor disclaimed the head lease under s. 54, sub-ss. 1 and 2, of the Bankruptcy Act, 1914 (1). Therefore, the vendor cannot convey what she has contracted to sell, for the property in question cannot now be properly described as underleasehold property. The head lease comprised hereditaments not comprised in the underlease, and the abstract did not and could not disclose the existence of the other pieces of land. [He referred to Williams on Vendor and Purchaser, 4th ed., p. 412.] Further, only when the full facts were disclosed did it become clear that the property which the vendor could convey would leave the purchaser liable to forfeiture and distress without anybody being liable on the covenants in the head lease. The purchaser is liable to eviction if she does not observe those covenants and does not pay the rent reserved by the head lease, notwithstanding that the head lease has come to an end under s. 54, sub-s. 2, of the Bankruptcy Act, 1914: *In re Finley* (1). The vendor is trying to force the purchaser to accept something which she cannot be forced to accept. She is entitled to a property in which she can live without danger of eviction and which she can sell with a good title. Therefore, the vendor ought to put the matter right by applying for an order vesting the head lease in herself.

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(1) By s. 1, sub-s. 1: "Where "any part of the property of the "bankrupt consists of land of "any tenure burdened with "onerous covenants . . . . the "trustee, notwithstanding that he "has endeavoured to sell or has "taken possession of the property, "or exercised any act of ownership "in relation thereto, but subject "to the provisions of this section, "may, by writing signed by him, "at any time within twelve "months after the first appointment of a trustee or such extended period as may be allowed "by the court, disclaim the "property . . . ."

By sub-s. 2: "The disclaimer "shall operate to determine, as "from the date of disclaimer, the "rights, interests, and liabilities "of the bankrupt and his property "in or in respect of the property "disclaimed, and shall also discharge the trustee from all "personal liability in respect of "the property disclaimed as from "the date when the property "vested in him, but shall not, "except so far as is necessary for "the purpose of releasing the "bankrupt and his property and "the trustee from liability, affect "the rights or liabilities of any "other person."

UTHWATT J. I have to decide whether the instrument with which the title commences can rationally be said to be an underlease as described in the contract for sale. To decide that question, I must consider sub-ss. 1 and 2 of s. 54 of the Bankruptcy Act, 1914. It is quite clear that a disclaimer does not determine the lease and all interests carved out of it by way of sub-lease or otherwise and that it is limited to determining the rights, interests and liabilities of the bankrupt in respect of the property. The rights of third parties remain on foot, except so far as it is necessary to release the bankrupt and his estate. The position of the lease after it has been disclaimed is rather curious, and cannot, I think, be summed up in any one phrase. That, perhaps, is not entirely a disadvantage.

In *In re Finley* (2) Lindley L.J., delivering the judgment of the Court of Appeal, clarified to some extent the position of a lease which had been disclaimed. He considered, first, the position where there are only the original lessor and the original lessee, and he took the view that, once there had been a disclaimer of the lease and the bankrupt's rights and liabilities had been determined, there could never be any person other than the original lessor interested in the property so that the lease itself determined and was to be treated as having been vested in the landlord. Taking, next, the case of a lease and an underlease, Lindley L.J. pointed out (3) that, if the underlessee became bankrupt, as between the underlessee and the underlessor the same consequences followed as where there was only a lease and the lessee became bankrupt. The original lessor was not affected in any way. Then the court considered the case where, there being an underlease, the original lessee became bankrupt. As between him and the lessor, the consequences were the same as if there were no underlease. Lindley L.J. said (3): "As between the lessee and the sub-lessee

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(1) (1888) 21 Q. B. D. 475.

(2) Ibid. 481, 482.

(3) Ibid. 485.

"the consequences will apparently be these. The lessee's "rights and interests and liabilities are determined under "sub-s. 2, and the extinction of his rights involves the extinction "of the liability of the sub-lessee under his covenants." That may necessarily follow. Finally, the court dealt with the case between the original lessor and the underlessee. Lindley L.J. said (1): "Now their rights and liabilities are preserved by "sub-s. 2, and, subject to the effect of a vesting order, whatever "that may be, the case will stand in this way—the sub-lessee, "although freed from his covenants to his own immediate "lessor, must perform the covenants of the original lease or "he will be liable to be distrained upon and to be ejected by "the original lessor. That is obviously his position, and that "was the position in which a lessee found himself, on the "disclaimer of the lease by the trustee in the bankruptcy of "his assignee, in *Hill* v. *East and West India Dock Co.* (2) "under the Bankruptcy Act, 1869." The lord justice points out that that is not an enviable position, but that the matter is remedied, to a certain extent, by the fact that, under the Bankruptcy Act, 1883, any person interested can apply for a vesting order and thus get the whole position clarified.

For my part, all I wish to emphasize is that it certainly is not the case that a lease disappears for ever simply because it has been disclaimed. Apart from any vesting order, a disclaimed lease is operative in the sense that failure to pay the rent reserved by it will justify distress, failure to perform the covenants contained in it will justify re-entry, and, as the Bankruptcy Act, 1914, itself recognizes, it can be vested in some person by an order under that Act. In my judgment, where there is an interest in land in circumstances in which these qualities subsist, the case cannot be treated as if the lease did not exist. The lease is there, to a certain extent, as something like a dormant volcano. It may break out into active operation at any time. In those circumstances, is it accurate to describe as an underlease the interest which has been carved out of the head lease while it was active although no vesting order has been made in respect of the head lease? For myself, I do not see what other name could be given to it. To call it a lease would clearly be to misdescribe it, and, in my judgment, if an underlease be an interest in land taking effect out of a validly created leasehold interest, the interest agreed to be sold, and described, in the present case, as an

(1) 21 Q. B. D. 475, 486.

(2) (1884) 9 App. Cas. 448.

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underlease, was in fact an underlease. Taking that to be the case, the property produced corresponds to that described in the contract, and I, accordingly, hold that it is no objection to the title that, at the date of the contract, the head lease had been made the subject of a disclaimer under s. 54 of the Bankruptcy Act, 1914. I will make a declaration that the vendor has sufficiently answered the requisitions and objections, and has shown a good title to the property.

Solicitors for vendor: *Ward, Bowie & Co., for Duggan, Elton & James, Birmingham.*

Solicitors for purchaser: *Kenneth Brown, Baker, Baker, for D. R. W. Stevenson, Squires & Co., Cambridge.*

K. R. A. H.

In re GOODSON'S SETTLEMENT.

GOODSON *v.* GOODSON.

UTHWATT J.
1943
Jan. 13.

Revenue—Income tax—Settlement—Annuity free of income tax—Direction to trustees to pay tax—Agreement for payment of annual payment without deduction of tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 23 (2.).

By a settlement of personalty made in 1925 the settlor, who had transferred a block of shares in a company to the trustees, directed the trustees to hold the residue of the funds upon trust to pay an annuity of 4000*l.* to his wife and other smaller annuities to other persons. The settlor declared that each annuitant should be entitled to enjoy her annuity free of income tax, and he directed the trustees to pay, in addition to each annuity, the income tax which might be payable in respect thereof after allowing for any exception or abatement to which the annuitant might by law be entitled having regard to the total amount of her income:—

Held, that the settlement did not create any agreement for the payment of the annuities in full without allowing deduction of tax which would be avoided by r. 23 (2.) of the All Schedules Rules under the Income Tax Act, 1918, and that, subject to the provisions of s. 25 of the Finance Act, 1941, each annuitant had an equitable right to receive an annuity of a net amount calculated after deduction of the tax thereon.

ADJOURNED SUMMONS.

By a settlement dated November 26, 1925, and made between the settlor, the late Sir Alfred Lassam Goodson, his sons and daughter therein named, and his wife, Lady (Mary Ethel) Goodson, and others as trustees, the settlor, after reciting that he had transferred to the trustees 100,000 preference shares in Alfred Goodson, Ld., and declaring certain trusts as to part of those shares, directed the trustees to stand possessed of the residue of the funds to the use that they should pay certain annuities, namely, an annuity of 4000*l.* to Lady Goodson and smaller annuities to other persons. The settlor declared that each of the annuitants should be entitled to enjoy her annuity free of income tax, and directed the trustees to pay, in addition to each annuity, the income tax payable in respect thereof after allowing for any exception or abatement to which the annuitant might by law be entitled having regard to the total amount of her income. The settlement was executed by Lady Goodson, but by no other annuitant. The summons was issued to determine questions of construction arising under the settlement, and, particularly, whether the annuities were payable subject to or free of income tax.

J. V. Nesbitt for the plaintiffs.

Gray K.C. and *Sir Lancelot Elphinstone* for Lady Goodson. The direction is valid, and the annuities are payable free of income tax. The direction is not in the ordinary form, but its effect is that, in the case of Lady Goodson's annuity, the trustees are to pay the income tax on such gross annual sum as, after deduction of tax at the current rate and subject to s. 25 of the Finance Act, 1941, will produce a net income of 4000*l.* Such a direction does not offend against rr. 19, 21 and 23 of the All Schedules Rules under the Income Tax Act, 1918. Lady Goodson and other annuitants were made parties to the settlement, but of them only Lady Goodson executed it and it contains no trace of any agreement between the parties: *Brooke* v. *Price* (1). It is clear that the settlor contemplated that the trustees should pay the income tax on these annuities.

Charles Romer K.C. and *Danckwerts* for infant defendants, did not argue.

Vaisey K.C. and *Vanneck* for other defendants. The direction not to deduct tax is prohibited by r. 23 (2.), of the All Schedules Rules (2), and it is, therefore, void. The settlement creates an agreement between the parties thereto for payment of the annuities free of tax within r. 23 (2.). In the Income Tax Act, 1842, s. 102, where the rule originally appears the words used were "all contracts, covenants and agreements." The settlor may have intended to give an annuity of such a gross sum as, after deduction of tax, should leave 4000*l.* net, but he has not done so effectively.

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(1) [1917] A. C. 115.

(2) By Income Tax Act, 1918, All Schedules Rules, r. 23 (2.): "Every agreement for payment "of interest, rent, or other annual "payment in full without allowing ". . . . deduction [of tax] shall be "void."

Uthwatt J. To take Lady Goodson's annuity as an example, it is clear that the intention of the settlor and the meaning and effect of the settlement was that she should receive yearly 4000*l.* spending money, subject only to the condition that, in ascertaining that amount, it is to be assumed that she has the benefit of the personal exemption or abatement to which she was entitled under the Income Tax Acts. In other words, if she had no other income, there was 4000*l.* a year, neither more nor less, which she would have to spend as the result of the disposition of the settlor, and, if she had income derived from other sources, the amount contributed by the settlement to her total income was to be unaffected. The direction to pay the income tax does not negative the construction to be put on the clause.

By r. 19 of the All Schedules Rules, under the Income Tax Act, 1918, where annuities are paid out of profits or gains brought into charge to tax, the payer is entitled—but clearly he is not bound—to deduct the tax payable in respect of the annuity. By r. 21, where the annuity is payable out of profits or gains not brought into charge the payer is bound to deduct the tax and account for it to the Commissioners of Inland Revenue. Rule 23 reproduces in substance s. 103 of the Income Tax Act, 1842, and is as follows: "(1.) A person who "refuses to allow a deduction of tax authorised by this Act "to be made out of any payment, shall forfeit the sum of 50*l.* "(2.) Every agreement for payment of interest, rent, or other "annual payment in full without allowing any such deduction "shall be void." The question is whether there is here any such agreement. In my opinion, there is not. When this settlement was executed, as appears from the recital, the whole of the trust funds had been transferred to the trustees. The point and form of the document are not that the settlor makes any agreement with anybody, but that he attaches rights to a fund which are in the hands of the trustees. The result is to create in the beneficiaries equitable interests, proprietary interests, in the fund and its income. It may be somewhat difficult to define accurately what the proprietary interest of an annuitant is in a fund, but that he has some equitable interest in it I have no doubt. His rights do not depend on any agreement. No annuitant under this deed could sue the settlor or the trustees on any agreement, and in executing the trusts the trustees would not be carrying out an agreement. If an annuitant wanted to enforce her rights under the document, her case would be that the trustees had in their hands funds which were subject to trusts one of which enured in her favour and she was seeking to enforce that proprietary right. She would not be seeking to enforce any bargain.

If that be the real position in law of funds held under such a settlement as this, it appears to me that there is no agreement within the meaning of r. 23 (2.) and that that rule has no application. I will, accordingly, declare that the annuities are payable free of income tax, subject to the provisions of s. 25 of the Finance Act, 1941.

Solicitors: *Church, Rendell, for Eastley & Co., Paignton.*

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Nov. 12, 13, 16; *Dec.* 15.

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Limitation of action—Debt—Acknowledgment—Administration—Payment of debts—Debtor's executor also creditor—Probate affidavit by executor showing debt due to him—Bankruptcy of executor—Estimate of assets—Inclusion of debt—Suspension of time while debtor's executor and creditor same person—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

A creditor, who was the sole executor of the will of his wife, stated, in an Inland Revenue affidavit made by him to obtain probate, that the list of debts of the estate included a sum of 9000*l.* due to him as representing the balance of a loan made by him to his wife after repayment to him of 1000*l.* in June, 1929. He became bankrupt in 1935, and the solicitors who were acting for him as executor of his wife's estate, sent to his trustee in bankruptcy a letter enclosing a copy of the executor's cash accounts and an estimate of the outstanding assets and liabilities. A note was appended to this document stating that "in addition to the "above outstanding liabilities there is a possible claim by [the "executor] for 9000*l.*, the balance of a loan made to the deceased in

"1924." The trustee having commenced proceedings in 1936 to recover this sum from the executor, the defence was set up that the claim was barred under the Limitation Act, 1623, s. 3:—

Held, (1.) that the statement in the affidavit did not constitute an acknowledgment of the debt so as to prevent it from being barred; (2.) that in the absence of evidence of authority in the solicitors to acknowledge the debt the note to the estimate did not constitute such an acknowledgment; and (3.) that the running of the Limitation Act was not suspended from the time that the creditor became the sole executor of his wife's will and there was only one hand to pay and to receive the debt.

Seagram v. *Knight* (1867) L. R. 2 Ch. 628 distinguished. Principle laid down in *Prideaux* v. *Webber* (1661) 1 Lev. 31, and *Rhodes* v. *Smethurst* (1838) 4 M. & W. 42; (1840) 6 M. & W. 351.

Decision of Bennett J. [1942] Ch. 276 affirmed on the first point.

APPEAL from Bennett J. (1).

The testatrix, Ellen Bowring-Hanbury, who died on March 17, 1931, by her will, dated October 16, 1918, appointed her husband, Victor Henry Bowring-Hanbury, sole executor, and devised and bequeathed to him the residue of her estate. On May 4, 1931, the executor, to obtain probate, swore an Inland Revenue affidavit in which there appeared in the list of debts the following item: "Balance due to Mr. Bowring-"Hanbury of loans made by him, 9000*l*." This sum was in respect of a loan of 10,000*l*., made by the executor to his wife in December, 1924, of which 1000*l*. had been repaid by her in June, 1929. On March 14, 1935, the executor was adjudicated bankrupt and the unpaid balance of the debt thereupon became vested in his trustee in bankruptcy. In June, 1936, a letter was written to the trustee by the executor's solicitors in which they enclosed a copy of his cash account as executor and an estimate of the outstanding assets and liabilities of the estate. At the foot of the latter document the following note appeared: "In addition to the above . . . . there is a "possible claim by Mr. Bowring-Hanbury for 9000*l*., the "balance of a loan of 10,000*l*. he made to the deceased in "1924." In July, 1936, an action was commenced by the trustee against the executor to recover the balance of the debt from the estate of the testatrix. The executor resisted the claim on the ground that it was barred under the Limitation Act, 1623, because more than six years had elapsed between June, 1929, and the commencement of the action. Bennett J. held that neither the statement in the affidavit nor the note

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(1) [1942] Ch. 276.

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to the estimate of outstanding assets and liabilities constituted an acknowledgment of the debt so as to prevent it from being barred by the statute. The trustee appealed, and on the appeal the additional point was taken that the running of the statute was suspended so long as the plaintiff and the defendant in an action to recover the debt would be the same person by reason of the creditor being the executor of the debtor.

Vaisey K.C. and *Sir George Jones* for the trustee. The probate affidavit sworn by the executor was an acknowledgment of the debt due sufficient to take it out of the Limitation Act, 1623. It is now well settled that the acknowledgment must be made to the creditor: compare *Tanner* v. *Smart* (1). In a case where the debtor and creditor are the same person, though in different capacities, how could an acknowledgment be more effectively given than by a solemn statement on oath that the debt is due? [Lord Greene M.R. If one regards the acknowledgment as made to the Probate Court, it cannot amount to more than a promise to pay, subject to any defence open to the executor.] Most of the authorities go against the creation of a new debt: see per Lord Sumner in *Spencer* v. *Hemmerde* (2) and Halsbury's Laws of England, vol. xx., 2nd ed., p. 625. The statement in the affidavit being made to a third party would not suffice where debtor and creditor were different persons, but where they are the same person in different capacities, it is impossible to get nearer to a new acknowledgment than a solemn statement on oath. In *Maniram* v. *Seth Rupchand* (3) and *In re Emmett* (4) there was no one who could be promisee, but a person can acknowledge to himself. Here the executor said in effect: "I acknowledge as executor that this debt is due from the "testatrix's estate to me personally." Where there is no room for an acknowledgment to a creditor, a solemn declaration by the debtor that the debt is due, implying an intention that it should be paid and binding the estate to pay it, is sufficient. [Lord Clauson referred to the notes to *Whitcomb*

(1) (1827) 6 B. & C. 603.

(2) [1922] 2 A. C. 507, 524.

(3) (1906) 22 T. L. R. 619.

(4) (1906) 95 L. T. 755. *Reporter's Note:* In *In re Emmett* Kekewich J. based his judgment on *Smith* v. *Poole* (1841) 12 Sim. 17 and *Edwards* v. *Janes* (1855) 1 K. & J. 534, in which it was expressly stated that the acknowledgment could be made to anyone. Both those cases were before *Fuller* v. *Redman* (No. 2) (1859) 26 Beav. 614 which lays down the modern rule that the acknowledgment must be made to the creditor.

v. *Whiting* (1).] The executor has placed on record the fact that the debt is due, and has shown an intention to pay it. [They referred to *In re Beavan* (2); *Lloyd* v. *Coote* (3) and *Stamford, Spalding and Boston Banking Co.* v. *Smith* (4) on this point.] Cases such as *Smith* v. *Poole* (5) are of no authority. Secondly, the note made by the solicitor on the estimate of debts and liabilities amounts to an acknowledgment. [Lord Greene M.R. Has a solicitor any authority to bind his client in this way?] He has a general authority to protect his client's interests, and this statement in conjunction with the probate affidavit may have greater authority than it would have had if the executor had not put on record that the debt was due. [Lord Greene M.R. referred to s. 13 of the Mercantile Law Amendment Act, 1856, as to acknowledgments by agents.] Thirdly, the statute is suspended while debtor and creditor are the same person: see Lightwood's The Time Limit of Actions, pp. 205 to 207; *Seagram* v. *Knight* (6); and Darby and Bosanquet's Statutes of Limitation, 2nd ed., p. 53. In the present case the period of limitation ceased to run when the grant of probate of the testatrix's estate was made to the executor: see *Musurus Bey* v. *Gadban* (7), *Sir John Nedham's Case* (8); and *Wankford* v. *Wankford* (9). In those cases the creditor made the debtor his personal representative, and the operation of the statute was suspended because he could not sue himself. It may be urged against us that in the converse case, where the debtor makes the creditor his personal representative, there is no need for the suspension of the statute since the executor has an alternative remedy by retainer, but the statute is one for the limitation of actions—it is not concerned with the existence of alternative remedies—and the bringing of an action is no more possible whether debtor and creditor are merged in the one way or in the other. [*Wynn Parry K.C.* In *Wilson* v. *Wilson* (10) it seems to have been assumed that on an executor going bankrupt his right of retainer ceased and a right of action arose to the trustee.] It is not contended that a grant of probate to the creditor amounts to an abandonment or extinguishment of the debt for ever except so far as the executor may exercise the right

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(1) (1781) 1 Sm. L. C., 13th ed., 633.
(2) [1912] 1 Ch. 196.
(3) [1915] 1 K. B. 242.
(4) [1892] 1 Q. B. 765.
(5) (1841) 12 Sim. 17.
(6) (1867) L. R. 2 Ch. 628.
(7) [1894] 2 Q. B. 352.
(8) (1611) 8 Co. Rep. 135*a*.
(9) (1699) 1 Salk. 299.
(10) [1911] 1 K. B. 327.

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of retainer, but that when the debt becomes vested in someone who has no right of retainer, the right to sue revives, and the statute begins to run. [They referred to Ingpen on Executors, 2nd ed., p. 519, and Williams on Executors, 12th ed., vol. ii., pp. 854, 858.] There are no words in the Bankruptcy Acts which enable the trustee to force the bankrupt to exercise this personal right of retainer. It is the property, not the remedy, which passes to the trustee. The right to recover this debt is an interest or obligation within the definition of "property" in s. 167 of the Bankruptcy Act, 1914. The executor can retain, but not sue. The trustee can sue, but not retain.

Wynn Parry K.C. and *Herbert Malone* for the executor (who were not called on to argue the first and second points). The trustee's third point is based on a fallacy. *Seagram* v. *Knight* (1) is not an authority for the proposition that wherever the same person is liable to pay and entitled to receive a debt, the statute is suspended, but only for the narrower one that where the debtor becomes the creditor's executor the statute is suspended since he cannot sue himself: *Wankford* v. *Wankford* (2) and *Sir John Nedham's Case* (3) show the narrow limits of *Seagram* v. *Knight* (1). Where, however, the creditor is made executor of the debtor's estate the reason for a suspension of the statute is absent for the remedy of retainer is available all through the time when creditor and debtor are the same person. It is a remedy alternative to action by which the executor can achieve precisely the same result. The Limitation Act runs against the creditor who cannot benefit merely because he becomes administrator of the debtor's estate, especially as he has the right of retainer and never, therefore, finds himself deprived of any remedy. The mere fact that there is delay in appointing an administrator of a debtor's estate does not prevent the statute from running: *Freake* v. *Cranefeldt* (4); *Rhodes* v. *Smethurst* (5). Equally, there is no suspension of the statute here and the trustee cannot recover the debt. No circumstances have been put before the court to establish an equity enabling the Court of Chancery to suspend the legal right under the statute.

Vaisey K.C. replied.

Cur. adv. vult.

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(1) L. R. 2 Ch. 628.
(2) 1 Salk. 299.
(3) 8 Co. Rep. 135*a*.
(4) (1838) 3 My. & C. 499.
(5) (1838) 4 M. & W. 42; (1840) 6 M. & W. 351.

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1942. Dec. 15. LORD CLAUSON read the judgment of the court (LORD GREENE M.R., LORD CLAUSON and DU PARCQ L.J.). The law as to the operation of an acknowledgment (which is authoritatively expounded by Lord Sumner in the House of Lords in *Spencer* v. *Hemmerde* (1)) has been altered by the Limitation Act, 1939, but (see s. 33 of that Act) not so as to affect the present case. Bennett J., referring to the decision of Neville J. in *In re Beavan* (2), held that the statement in the Inland Revenue affidavit was a mere statement of facts and not an acknowledgment of anything to anybody, and could not be taken to imply a promise, and, in any case, was not made to the creditor or the creditor's agent. This decision appears to us to be plainly right and to accord with *Stamford, Spalding and Boston Banking Co.* v. *Smith* (3), and *Lloyd* v. *Coote* (4). As regards the note written to the trustee in bankruptcy by the executor's solicitors, Bennett J. held that the document disclosed no intention of acknowledging the existence of the debt. However this may be (and we express no opinion on the point), it is a complete answer to the plaintiff's plea based on this note that there was no evidence of any authority given to the solicitors by the executor to make any acknowledgment of the debt on his behalf. We, accordingly, see no ground for interfering with the learned judge's decision on the points submitted to him by the parties.

It remains, however, to deal with an entirely different point, which was raised for the first time in this court. The trustee assumed, for the purposes of this point, that the statute began to run from June, 1929, the last date on which a payment was made on account of the debt, but he contended that, in computing the period of six years referred to in the Act, the time after March 17, 1931, must be disregarded, since from that date, owing to the fact that the wife had appointed the husband her executor, there was one hand only to pay and to receive, and that, in consequence, as it was said, the operation of the statute was "suspended" and the statute ceased to operate while that state of affairs continued. It was not clear to us whether it was admitted or not that the statute resumed its operative effect as from March 14, 1935, when, as it was suggested, the debt became vested in the trustee in bankruptcy, and, accordingly, if the latter suggestion was correct, there were again two parties concerned, the one to pay and the other to receive. It must be admitted, and, indeed, the contrary was not contended, that there is nothing in the words of the Limitation Act to produce this cesser of the operation of the statute, but it was said that it was settled by the authority, binding on this court, of *Seagram* v. *Knight* (1), that the operation of the Limitation Act might be "suspended" in the proper circumstances, and that the circumstance that there was one hand only both to pay and to receive would be a circumstance that would "suspend" its operation. It, accordingly, becomes necessary to examine what was decided in *Seagram* v. *Knight* (1).

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(1) [1922] 2 A. C. 507.
(2) [1912] 1 Ch. 196.
(3) [1892] 1 Q. B. 765.
(4) [1915] 1 K. B. 242.

It is convenient, first, to recall that as long ago as 1661 (*Prideaux* v. *Webber* (2)) it was decided in effect that when time had begun to run it continued to run, and that there was no warrant for excluding from the period of limitation a space of time when, owing to the closing of the courts, no action could be brought. This decision appears to have been based on the view that the words of the Act governed the matter, and that the absence of any exception in the Act of a space of time when no action could in fact be brought was fatal to the suggestion that such an exception existed: see *Bynton's Case* (3), referred to in *Hall* v. *Wybourn* (4), and the judgment of the Privy Council delivered by Grant M.R. in *Beckford* v. *Wade* (5). These decisions would seem to make it difficult to read into the Act an exception of a space of time when no action could be brought because there was one hand only both to pay and to receive. It should also be noted that the fact that, owing to the death of a debtor and subsequent delay in constituting a personal representative to him, there is a space of time during which the creditor cannot sue for the debt does not enable the creditor to call for the exclusion of that space of time from the period of limitation. This was settled, after elaborate argument, in *Rhodes* v. *Smethurst* (6). The matter was considered in this court in *In re Benzon* (7), when Channell J. delivering the judgment of the court (Cozens-Hardy M.R., Buckley L.J. and Channell J.) said: "The real difficulty in the way of the appellants is the "well-established rule that if the statute once begins to run "it continues to run whatever happens. The only case we

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(1) L. R. 2 Ch. 628.
(2) (1661) 1 Lev. 31.
(3) Unrep.
(4) (1689) 2 Salk. 420.
(5) (1805) 17 Ves. 87.
(6) 4 M. & W. 42; 6 M. & W. 351.
(7) [1914] 2 Ch. 68, 76.

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"can find in the books where the running of the statute has "been said to have been suspended is a decision of Lord "Chelmsford L.C. in *Seagram* v. *Knight* (1); but that was a "peculiar case on very special facts, and, whatever view may "be taken of it, it clearly is not an authority in the present "case. The general rule is clear; *Coply* v. *Dorkmincque* (2), "where after the time had begun to run the courts were closed "owing to the rebellion and no action could be brought, is a "very strong case. *Rhodes* v. *Smethurst* (3) is another strong "case, where the whole matter was carefully considered. The "principle of the rule—if on such a technical matter there can "be said to be any principle—appears to be that if any man "has a cause of action which is ripe so that he has an opportunity of bringing his action and does not do so, he thereby "takes the risk of some unexpected event happening which "takes away from him the possibility of bringing his action "within the remainder of the period which he has under the "statute. The rule may work hardship in particular cases, "but it is so well established that no court would now decline "to follow it." The only comment we would venture to make on this passage is that it seems clear that by some slip the case in Levinz to which Channell J. referred has been cited as *Coply* v. *Dorkmincque* (2), whereas the learned judge must have intended to refer to *Prideaux* v. *Webber* (4).

Seagram v. *Knight* (1) came first before Romilly M.R. (5). The material facts were that from 1830 the grandfather, W. F. S., was tenant for life of certain freeholds with remainder to the father, W. L. S., in fee. The grandfather, W. F. S., cut certain timber in 1831 while the father, W. L. S., was still under age (in circumstances which, in the opinion of the Master of the Rolls, made the cutting a wrongful act) and treated the proceeds as his own. In 1842, 1843, and March, 1844, the grandfather, W. F. S., again cut timber wrongfully. In April, 1844, the remainderman, the father, W. L. S., died intestate leaving the grandson (the plaintiff), then an infant, as his only son and heir. The grandfather, W. F. S., took out administration to the father, W. L. S., durante minore aetate of the grandson (the plaintiff), and after the death of the father, W. L. S., cut further timber wrongfully. In November, 1864, the grandfather, W. F. S., died. In March,

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(1) L. R. 2 Ch. 628.
(2) (1676) 2 Lev. 166.
(3) 4 M. & W. 42; 6 M. & W. 351.
(4) 1 Lev. 31.
(5) (1867) L. R. 3 Eq. 398.

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1865, the grandson (the plaintiff) came of age, and in March, 1866, having taken out administration to the father, W. L. S., filed a bill against the executor of the grandfather, W. F. S., for an account of all moneys received by the grandfather, W. F. S., in respect of timber cut on the land during the life of the father, W. L. S., and since the death of the father, W. L. S., and for payment to the grandson (the plaintiff) of such moneys with interest from the death of the grandfather, W. F. S. The executor of the grandfather, W. F. S., offered to account to the grandson (the plaintiff) for the proceeds of the timber cut after the death of the father, W. L. S., with interest from the death of the grandfather, W. F. S. This offer the grandson (the plaintiff) declined. Romilly M.R. held that this offer would give the grandson (the plaintiff) all that he was entitled to, and decreed in terms of the offer. He decided that the statute must be considered to have run from the period when the father, W. L. S., attained twenty-one and that the claim to the proceeds of the timber cut in 1831 must, therefore, be treated as statute-barred. He also considered that in the circumstances of the case the claim for the timber money must be treated as having been settled between the grandfather, W. F. S., and the father, W. L. S., in the lifetime of the father, W. L. S., and on this ground he refused an account in respect of the timber cut in the lifetime of the father, W. L. S., in 1842, 1843, and March, 1844.

The grandson (the plaintiff) took the case on appeal to Chelmsford L.C., and the case took a course which must be related in detail. Counsel for the grandson (the plaintiff) agreed that the cutting by the grandfather, W. F. S., was rightful as the court would in the circumstances have directed the cutting, that the income of the proceeds would, accordingly, belong to the grandfather for life, and that the remainderman (sc. the father, W. L. S., or his heir, the plaintiff) would become entitled to them only on the death of the grandfather, W. F. S., in 1864. On that footing he submitted that the right of the grandson (the plaintiff) to claim the proceeds of the timber did not accrue until the grandfather's death. This argument, if successful, would have resulted in the grandson (the plaintiff) obtaining an account of the proceeds of the timber cut in 1831, as well as of the proceeds of the timber cut in 1842, 1843, and March, 1844. As an alternative argument the plaintiff submitted that the statute had not run because the grandfather, W. F. S., became administrator to the father,

W. L. S., and the same hand, therefore, was to pay and to receive. Counsel for the plaintiff cited *Burrell* v. *Egremont* (1) and *Wynne* v. *Styan* (2). The former case decides that the Limitation Act has no application to a case where there is no assignable person liable to pay a charge which a limited owner claims to keep alive for his own benefit and no person who by the delay could be induced to suppose the charge abandoned or merged and where the rent out of which the interest on the charge ought to be paid is receivable by and belongs to the person who is entitled to the interest on the charge if it be alive. *Wynne* v. *Styan* (2) seems to be relevant only as recognizing the principle that where a mortgagee is in receipt of the rents of the mortgaged estate the Limitation Act does not run against the mortgage charge, that is to say, that in such circumstances the mortgagee must for the purposes of the statute be treated as receiving interest on the mortgage, and, accordingly, there is no room for the application of the statute. Counsel for the defendant, having pointed out that the case was concerned with persons in whom legal estates were vested, and that, even if application could have been made to the court by the tenant for life for leave to cut the timber, the court would not in this particular case have sanctioned it (a view with which the Lord Chancellor agreed (3)) was stopped by the Lord Chancellor. In reply, the plaintiff's counsel reiterated his submission that the court would in this particular case have sanctioned the cutting of the timber, and that the cutting was, accordingly, not wrongful, and that the proceeds must be treated as belonging to the remainderman subject to the life interest of the grandfather, W. F. S., in the income. The Lord Chancellor, however, proceeded to deal with the case on the footing that the cutting was wrongful, and that the remedy of the remainderman was either in trover or in an action for money had and received and that the question was whether the remedy was barred. His Lordship had no difficulty in holding that the claim in respect of the cutting in 1831 must be treated as barred. As regards the cutting in 1842, 1843, and March, 1844, his Lordship differed from the view of the Master of the Rolls that the claim of the father, W. L. S., must be presumed to have been settled, and his Lordship quite clearly held that the operation of the statute had been suspended as from the time when the grandfather,

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(1) (1843) 7 Beav. 205.

(2) (1847) 2 Phil. 303.

(3) L. R. 2 Ch. 628, 630, 631.

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W. F. S., became the administrator of the father, W. L. S., and the same hand, namely, that of the grandfather, W. F. S., was the hand to pay (as the hand of the tortfeasor) and the hand to receive, as the hand of the personal representative of the father, W. L. S., the remainderman who had suffered by the tort. When judgment had been delivered counsel for the defendant referred for the first time to *Rhodes* v. *Smethurst* (1), and suggested, as indeed might well seem to be the case, that the Lord Chancellor could not reach his decision without overruling the principle recognized in *Rhodes* v. *Smethurst* (1) that when the statute had once begun to run it could not be stopped. Thereupon, the Lord Chancellor seems to have disclaimed any intention of overruling *Rhodes* v. *Smethurst* (1), explaining, as we read his observations, that the statute would not be suspended by the fact of the creditor becoming the executor of the debtor, but that the statute might well be, and was to be, treated as suspended by the fact that (as was the case in *Seagram* v. *Knight* (2) then under consideration) the debtor became the administrator of the creditor. The Lord Chancellor seems to have satisfied himself that the latter proposition was to be deduced from *Nedham's Case* (3) and *Wankford* v. *Wankford* (4). Whether his Lordship's view on this point would be held to be correct in a court not bound by his decision, it would not be pertinent for us, sitting in a court bound by his decision, to consider, but, if we are right in construing his Lordship's observations as indicating that *Rhodes* v. *Smethurst* (1) was rightly decided in so far as it recognizes the general principle that a space of time during which it is impossible to sue for a debt is not to be excepted from the six years period, but that in the special case where the impossibility is due to the fact that the debtor has become the administrator of the creditor the rule is otherwise, his Lordship's judgment in *Seagram* v. *Knight* (2) is an authority against and not for the correctness of the argument put forward by the trustee in the present case that the space of time during which the creditor was (as, indeed, he still is) the executor of the debtor is to be excepted from the period of six years laid down by the statute.

Before leaving *Seagram* v. *Knight* (2) we may point out that there the debtor was the administrator, not the executor, of the creditor. Lord Chelmsford L.C. bases his decision narrowly on this fact, citing in support of it *Wankford* v. *Wankford* (1), where a distinction between the case of a debtor administrator and that of a debtor executor is drawn by Powys J. (2). In the case of a creditor executor that learned judge points out that "the debt is not extinct, but only upon supposal that the "executor has assets, which he may retain to pay himself." In the present case it was agreed by counsel on both sides that this "supposal" does not arise on the facts. *Wankford* v. *Wankford* (1) is certainly not an authority in favour of the trustee and it was only relied on by Lord Chelmsford L.C. as covering the special case of a debtor administrator. It is no authority for the proposition that the statute is suspended where the creditor is the executor of the debtor. As was pointed out by Powys J. (3), such a creditor could sue the heir in case of failure of assets.

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(1) 4 M. & W. 42; 6 M. & W. 351.
(2) L. R. 2 Ch. 628.
(3) 8 Co. Rep. 135*a*.
(4) 1 Salk. 299.
(5) L. R. 2 Ch. 628.

We should add that in the argument before this court it was assumed that the debt from the testatrix to the executor continued to exist after the executor had become the executor of the testatrix and vested in his subsequent bankruptcy in his trustee. In the view we take of the case, it becomes unnecessary to decide whether this assumption was correct. If the point is raised in the future in some other case it may become necessary to consider the judgment of Channell J. in *Wilson* v. *Wilson* (4). For these reasons we are satisfied that the new point raised in this court by the trustee is not sound. It follows that the appeal fails, with the usual result as to costs, and the judgment of Bennett J. dismissing the action will stand.

Appeal dismissed.

Solicitors: *Woolfe & Woolfe; Hopgood & Co.*

(1) 1 Salk. 299.
(2) Ibid. 303.
(3) Ibid. 304.
(4) [1911] 1 K. B. 327.

H. C. G.

C. A.
1943
Jan. 22.

In re HOOPER'S SETTLEMENT.

PHILLIPS *v.* LAKE AND OTHERS.

Settlement—Construction—Instrument made before January 1, 1926—*Declaration of trust by reference to Statutes of Distribution—Ascertainment of class—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 50, *sub-s.* 2.

The ultimate trust under a voluntary settlement made in 1912 was " for such person or persons as would have become entitled " to the settled fund under the statutes for the distribution of the " personal estate of intestates at the death of the settlor had he " died possessed thereof intestate and without having been " married such persons if more than one to take as tenants in " common in the same shares in which they would have taken " under the same statutes." The settlor died in 1941, intestate and unmarried :—

Held, that the clause amounted to a mere declaration of trust by reference to the Statutes of Distribution, without showing any " contrary intention " within s. 50, sub-s. 2, of the Administration of Estates Act, 1925, with the result that the trust must be construed as referring to the enactments relating to the distribution of effects of intestates which were in force immediately before the Act, namely, the Statute of Distribution (22 & 23 Car. II. c. 10).

APPEAL from Farwell J.

By a voluntary settlement made on July 12, 1912, by Gerald Lake Hooper, the settlor conveyed certain funds to trustees upon trusts not material to this case, and ultimately, in the event which happened, " in trust for such person or "persons as would have become entitled to the settled fund "under the statutes for the distribution of the personal estate "of intestates at the death of the settlor had he died possessed "thereof intestate and without having been married such "persons if more than one to take as tenants in common "in the same shares in which they would have taken under "the same statutes." The settlor died on August 9, 1941, intestate and unmarried, and the trustees of the settlement took out an originating summons for the determination of the question whether the persons entitled to the settled fund were the persons entitled under the Statute of Distribution (22 & 23 Car. II. c. 10), or those entitled under the Administration of Estates Act, 1925. In the former case the persons entitled were the surviving aunts and an uncle (who had died after

August 9, 1941) of the settlor. In the latter case, the children of deceased aunts and uncles would also be entitled to share per stirpes. Farwell J. held that the settlement showed no such contrary intention as to exclude s. 50, sub-s. 2, of the Administration of Estates Act, 1925 (1), and that the Act of Charles II., therefore, applied. The persons entitled under the Act of 1925 appealed.

Vaisey K.C. and *Lightman* for the person appointed to represent the class who would be entitled under the Act of 1925. The decision of Farwell J. involves a non sequitur. He found on construction that the settlement referred to the statute of 1925, but, there being ambiguity, there was no "contrary intention" and the old statutes prevailed under s. 50, sub-s. 2. He based that view on a dictum of Luxmoore J. in *In re Sutton* (2) that it was necessary to find a positive contrary intention, but it is submitted that, once he had construed the settlement, the ambiguity ipso facto disappeared, and that his finding that it was intended that the new statutes should apply amounted to a finding of a contrary intention. [They referred to *In re Sutcliffe* (3).] Farwell J. was right in saying that the better construction was to regard the ascertainment both of law and fact as brought forward to the date of the settlor's death, but he drew the wrong conclusion from that construction.

Wynn Parry K.C. and *Raymond Jennings* for the surviving aunts of the settlor. The old statutes were clearly intended. The sub-section directs that the instrument to be construed shall be approached by assuming that the phrase "Statutes "of Distribution" refers to the old law unless the settlor uses clear words showing that he intends the new to be adopted. Here the language is ambiguous. If there are two constructions, one of which gives effect to every word without requiring the insertion of new words, that construction should be preferred. Here the natural meaning of the clause is

(1) By Administration of Estates Act, 1925, s. 50, sub-s. 2: "Trusts declared in an instrument inter vivos made, or in "a will coming into operation "before [January 1, 1926,] by "reference to the Statutes of "Distribution, shall, unless the "contrary thereby appears, be "construed as referring to the "enactments (other than the "Intestates' Estates Act, 1890) "relating to the distribution of "effects of intestates which were "in force immediately before the "commencement of this Act."

(2) [1934] Ch. 209.

(3) [1929] 1 Ch. 123.

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"such person or persons as would have become entitled to "the settled fund at the death of the settlor under the "statutes for the distribution of the personal estate of "intestates." The interpretation " the statutes at the death "of the settlor " is ungrammatical and requires at least the insertion of the words " in force." [He was stopped.]

Beebee, for the personal representative of the settlor's uncle, and *Gutch,* for the plaintiffs, were not called on to argue.

LORD GREENE M.R. The practical issue is whether the language of the settlement is to be construed as referring to the Administration of Estates Act, 1925, or to the statutes relating to the distribution of the effects of intestates in force immediately before the commencement of that Act, namely, January 1, 1926. If the former view be correct, the cousins will be entitled to share in the fund ; if not, the cousins are excluded. In construing the settlement regard must be had to s. 50, sub-s. 2, of the Act of 1925 which lays down a statutory rule of construction that must be applied to trusts declared in the specified manner. The language of the sub-section seems to me to mean clearly that, if all that one finds on the true construction of a document of the date mentioned is a declaration of trust by reference to the Statutes of Distribution, the court is bound to construe those trusts as referring to the statutes in force immediately before the commencement of the Act of 1925. If, on the other hand, when the document is looked at, a contrary intention (which clearly means an intention that the trusts shall not be construed by reference to the earlier statutes) is found, then the court, whatever view it might have taken apart from the sub-section, has no option but to apply the Act of 1925.

It seems to me, therefore, that the first question which has to be answered is whether the words used in this settlement do anything more than declare trusts by reference to the Statutes of Distribution. If the document does that and nothing else, however obscurely it does it, there is an end of the matter. It appears to me that this settlement does not contain anything more than such a declaration. Mr. Vaisey maintained that the words " at the death of the settlor " referred to " the statutes for the distribution of the personal "estate of intestates," and that the phrase, read as a whole, meant " the statutes for the distribution of the personal

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"estate of intestates in force at the death of the settlor." Had that been the true construction there would clearly have been a contrary intention appearing because the settlor would in fact have been saying: "This is not a mere declaration "of trust by reference to the Statutes of Distribution. It "is a declaration of trust specifically directed to the statutes "for the distribution of the personal estate of intestates which "may happen to be in force at a particular time." It is, however, to be observed that that construction involves, as a matter of English, writing into the clause at least the two words "in force," because the phrase "the statutes for the dis-"tribution of the personal estate of intestates at the death of "the settlor" by itself would be an ungrammatical, or, at any rate, a very loose way of referring to statutes in force at that particular time. On the other hand, to link the words "at "the death of the settlor" to the words "would have been "entitled" does not involve the insertion of any words. It is a perfectly grammatical sentence, the English and style of which could not be criticized. The draftsman of this document might have written "as would at the death of the "settlor have become entitled." If he had done so, he would have written as good English as the draftsman of the document, who preferred to insert the words "at the death of the settlor" later in the sentence, has written.

I, therefore, find myself forced to the conclusion that there is nothing here beyond a declaration of trusts by reference to the Statutes of Distribution and that no contrary intention appears in the language used. That being so, the sub-section comes into operation. The declaration of trusts by reference to the Statutes of Distribution was, and still, I suppose, is, a common thing in settlements and wills, and the legislature, knowing of the existence of that practice, has laid down a rule for the construction of such references. Such authority as there is supports the view which I have expressed. The language used in the document in *In re Sutcliffe* (1) was on all fours with the language which we have before us save that the draftsman there split the clause in a different way. Eve J. decided that case in the way in which this case, in my opinion, ought to be decided. In *In re Sutton* (2) Luxmoore J. construed the language before him in the same sense and on the same principles as those which I have indicated. When he refers to the necessity of finding a positive contrary

(1) [1929] 1 Ch. 123.

(2) [1934] Ch. 209.

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intention in the will before the Act of 1925 can apply, he means no more than I have myself ventured in my own language to say, namely, that it is not sufficient merely to declare trusts by reference to the Statutes of Distribution. It is necessary to do something more to avoid the results laid down in the sub-section, and that something more is the manifestation of a contrary intention. That does not mean, and Luxmoore J.'s observations do not mean, that it is necessary to express that intention in so many words. Like all intentions, it can be collected from the true construction of the document as a whole. It can appear by express language or by implication according to ordinary principles. In my opinion, Farwell J.'s conclusion was right, and the appeal must be dismissed.

MACKINNON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal dismissed.

Solicitors for the persons entitled under the Act of 1925: *Torr & Co., for Donald G. Ineson, Cleckheaton.*

Solicitors for the aunts entitled under the Act of Charles II.: *Robbins, Olivey & Lake.*

Solicitors for the executors of the deceased uncle: *Field, Roscoe & Co.*

Solicitors for the plaintiffs: *Beachcroft & Co.*

J. W. H.

In re A. SINGER AND COMPANY (HAT MANUFACTURERS), LIMITED.

C. A.
1943
Jan. 25.

Company—Winding-up—Practice—Undue preference—Summons for declaration that payment invalid—Joinder of sureties as third parties or respondents—Direction to liquidator to substitute proceedings by writ.

The liquidator of a company in compulsory liquidation issued a summons, to which the only respondents were Lloyds Bank, asking for a declaration that a payment of 1969*l.* 12*s.* 9*d.*, part of a payment of 2000*l.* made by the company to the bank by way of reduction of the company's overdraft at the bank, was an undue and fraudulent preference of the bank and/or of Abraham Singer, a guarantor of and surety for the overdraft, and/or of Sarah Singer, a surety for the overdraft, and was, accordingly, invalid. The summons also asked for a declaration that the moneys so paid formed part of the moneys divisible among the company's creditors and for an order for repayment. In the winding-up the bank applied for leave to issue a third-party notice under R. S. C., Or. XVI.A, and to serve it on Abraham and Sarah Singer, and alternatively that Abraham and Sarah Singer might be added as respondents to the summons. The registrar made no order on the application, and the bank appealed. Simonds J. decided against the bank on both points, and also on the further point, raised at the hearing before him, that the liquidator might be directed to discontinue proceedings by summons in the winding-up and institute proceedings by writ against the bank:—

Held, (1.) that it is no part of the duty of the court to direct adequate proceedings in a winding-up to be discontinued to enable different proceedings to be brought, and, therefore, that Simonds J. was right in declining to exercise his discretion by directing the liquidator to institute proceedings by writ; (2.) that third-party procedure is not applicable in proceedings in the winding-up of companies.

In re Land Securities Co. (1895) 2 Mans. 127 considered and approved.

Quaere whether a surety can be made directly liable in a case of fraudulent preference.

APPEAL from Simonds J.

The facts are stated in the headnote.

Belsham for the bank. Third-party procedure is, in the discretion of the court, applicable to such a case as the present. The chief authority to the contrary, *In re Land Securities*

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

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Co. (1), was wrongly decided, and should be over-ruled by this court. The authorities are conflicting on the point whether the sureties should be added as respondents to the summons : *In re G. Stanley & Co., Ld.* (2) ; *In re Lyons* (3) ; *In re Conley* (4) ; but they were decided, in the main, on the facts of the respective cases, and in law the sureties can be added as parties to such a summons as this. The liquidator should be directed to discontinue proceedings by summons, and institute proceedings by writ, when the third-party procedure would clearly apply.

Mark Goodman for the liquidator. *In re Land Securities Co.* (1) was rightly decided. Third-party procedure is not applicable in winding-up proceedings, or to settle questions that are outside the winding-up. The authorities would not permit the liquidator to add the sureties as parties to the summons. There is no justification for discontinuing the proceedings by summons and beginning fresh proceedings by writ.

LORD GREENE M.R. By the joint operation of s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914, transactions made with a view to giving any creditor or a surety or guarantor for the debt due to a creditor a preference over other creditors are, in the circumstances stated, to be deemed to be fraudulent preferences and invalid accordingly. There is no suggestion in the present case of any conscious action by the bank to obtain a fraudulent preference, but the liquidator, in exercise of his duty to get in the company's assets, has made the bank alone respondent to the summons because the bank is unquestionably solvent and, if the liquidator's allegation is established, the money will be recovered from the bank. The bank, however, wishes to bring before the court the two sureties, whose release the impugned payment to the bank purported to effect, so that all persons affected may be present and bound by any judgment that is given.

The bank suggests three ways by which this might be done. The method last suggested is that the liquidator should be ordered to discontinue proceedings by summons in the winding-up and institute proceedings by writ against the bank. If that were done, the bank would have an opportunity of bringing in the guarantors, who are alleged to have been personally preferred, by third-party notice. Simonds J. declined to exercise his discretion in that matter, and, in my opinion, he was right. It is no part of the duty of the court to direct adequate proceedings in a winding-up to be discontinued to enable different proceedings to be brought, however interesting the question to be decided may be. No possible attack can be made on the learned judge's decision in that respect.

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(1) (1895) 2 Mans. 127.

(2) [1925] Ch. 148.

(3) (1934) 152 L. T. 201.

(4) (1938) 158 L. T. 323.

The second suggestion is that the liquidator be ordered to add the two sureties as parties to this summons. The authorities are not conclusive on the question whether a liquidator can obtain direct relief against a surety in such a case as the present. They differ from one another. In *In re G. Stanley & Co., Ld.* (1), Eve J. took the view that the persons actually preferred, namely, the sureties, could be made liable to repay, whereas in *In re Lyons* (2) Clauson J. expressed the opposite opinion. Both those cases were in bankruptcy, but I see no reason to think that the observations contained in them would not apply to a winding-up case. The question, therefore, whether a surety can be made directly liable in the case of a fraudulent preference is an open one. If we acceded to the suggestion that we should direct the liquidator to add the sureties as parties, we should in effect be directing the liquidator to bring before the court persons in whom he is not interested, because he already has a solvent respondent to the proceedings which he has brought. He does not need to have those persons there to enable him to discharge his duty of getting in the assets and, if we ordered them to be added as respondents, we should merely be doing so to enable to be decided a question of law which is irrelevant, at any rate for practical purposes. I can understand the desire of the bank to have the matter decided, but it is no part of the function of this court, in exercising its discretion, to accede to a desire of that kind, however reasonable it may be. The practical question is raised by the liquidator and there is no need to go beyond that.

As the first of the suggested grounds for relief the bank asks that it should be given leave to serve third-party notices on these two sureties. Simonds J. held that third-party procedure was not applicable to such a case as this, and pointed out that no one has tried to introduce third-party procedure into the summary jurisdiction of the court in

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(1) [1925] Ch. 148.

(2) 152 L. T. 201.

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company matters since the unsuccessful attempt to do so which was made in *In re Land Securities Co.* (1). In that case, which was one of alleged misfeasance, an attempt was made by the directors, who were being attacked, to bring in shareholders as third parties. Vaughan Williams J. held that there was no jurisdiction to make such an order, and he added that, even if there were jurisdiction, it would be discretionary, and such a discretion could not be exercised in the case before him. That authority is now questioned and it is said, rightly, that we are entitled to review it. When the basis of the jurisdiction in the winding-up of companies is examined, it appears to be quite plain that the third-party procedure is not applicable in winding-up. The Companies (Winding-Up) Rules, 1929, are made under s. 305 of the Companies Act, 1929, and the power to make them is the power to "make general "rules for carrying into effect the objects of this Act so far as "relates to the winding-up of companies in England." Rule 1 of the winding-up rules describes the scope of the rules. They are to "apply to the proceedings in every winding-up under "the Act of a company, which shall commence on and after "the date on which these rules come into operation." The precise procedure to be followed is found in r. 5 and r. 6 and the following rules. Summarizing them, so far as is necessary for present purposes, one may say that an application such as that of the liquidator in the present case may be heard in chambers by the registrar, under the general or special directions of the judge: r. 7, sub-r. 1. Under r. 8, sub-r. 2, every application in chambers is to be made by summons. Accordingly, we have here an application under the summary jurisdiction created by those rules. The application of the liquidator is made to the High Court exercising the winding-up jurisdiction and comes before the judges nominated by the Lord Chancellor to exercise that jurisdiction: see s. 164 of the Companies Act, 1929. What jurisdiction would the company judge be exercising if leave to serve a third-party notice could be granted? In deciding the issues raised by such a notice he would not be deciding anything material to the winding-up; the only relevant matter is the controversy between the liquidator and the bank. The question whether, as the result of the decision of that controversy, the bank has a right over against the third persons has nothing to do with the winding-up.

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(1) 2 Mans. 127.

What would be the position of the judge who dealt with that issue? Would he be exercising the winding-up jurisdiction conferred on him by the Lord Chancellor? It seems to me to be clear that he would not. He would be exercising a jurisdiction which had nothing to do with winding-up. If the argument which has been submitted to us is correct, it would have the effect of bringing a third person, who is outside the winding-up, before a winding-up court and forcing him to submit to the jurisdiction of a tribunal, whose jurisdiction is ex hypothesi limited to winding-up matters. It seems to me, therefore, to be impossible to find any jurisdiction in the court to apply the third-party procedure and take into its consideration disputes which have nothing to do with the winding-up. When the language of Vaughan Williams J. in *In re Land Securities Co.* (1) is considered, it appears that it was precisely this aspect of the matter which he had in mind, because he says: "The liquidator may avail himself of "any rights which the directors may have against the share-"holders, but he can only do so in a court in which the directors "could themselves recover, and the directors cannot recover "in winding-up." That is to say, the directors could not recover against the persons whom it was there sought to bring in as third parties in winding-up. The reason, I venture to think, is the reason which I have given, namely, that the winding-up court has no jurisdiction to settle disputes between persons who are for the purpose of those disputes altogether outside the winding-up. That, in my opinion, is sufficient to dispose of this appeal.

MacKinnon L.J. I agree.

Luxmoore L.J. I also agree.

Appeal dismissed.

Solicitors for the bank: *Stafford Clark & Co.*
Solicitors for the liquidator: *Peachey & Co.*

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(1) 2 Mans. 127, 128.

FARWELL J.

1943

Jan. 18, 29

In re DE MARNEY.

Ex parte OFFICIAL RECEIVER *v.* SALAMAN.

Bankruptcy — Professional earnings — Assignment — Subsequent bankruptcy of assignor—Validity of assignment as against trustee in bankruptcy.

An assignment by a member of a profession of his future earnings is, as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative as against his trustee in bankruptcy.

MOTION.

By cl. 1 of a deed of arrangement entered into on May 21, 1940, by a debtor with certain creditors the debtor agreed to pay "half of his earnings as an actor or otherwise less income "tax . . . . to the trustee [of the deed] until such time as the "claims of the creditors to whom the debtor is legally liable "shall have been paid in full." By cl. 14 the creditors granted the debtor a release "from all debts, claims and demands of "the creditors respectively against the debtor of whatsoever "nature or kind the same may be" and it was provided that, if he should be adjudicated bankrupt before the creditors were paid in full, the release should be void and the creditors should have power to prove in the bankruptcy. On May 12, 1942, a receiving order was made against the debtor on his own petition, the Official Receiver being the trustee in the bankruptcy. On September 30, 1942, the debtor was granted his discharge, subject to a suspension of eighteen months. After the date of the adjudication, the debtor's employers paid to the trustee of the deed a sum of 57*l.* which represented a proportion of the debtor's earnings after the adjudication. By the present motion the Official Receiver asked for a declaration that the obligation undertaken by the debtor under the deed did not authorize him to pay to the trustee of the deed or that trustee to receive any moneys earned by the debtor between the date of the adjudication and the date when his discharge would become effective.

Aronson for the Official Receiver. After bankruptcy the personal earnings of a bankrupt belong to the trustee in the bankruptcy, subject to the retention by the bankrupt of as much as is necessary for the support of himself and his family.

[He referred to Williams on Bankruptcy, 15th ed., p. 279, and *In re Roberts* (1).] An attempt by a bankrupt to assign property before his bankruptcy becomes invalid on the bankruptcy. There is no direct authority in the case of professional earnings, but in *Ex parte Nichols* (2) it was held that an attempt to assign the profits of a business was void in the circumstances under consideration. [He referred to *In re Davis* (3); *Wilmot* v. *Alton* (4); and *In re Collins* (5).]

Raeburn for the trustee of the deed of arrangement. The deed is of as much force after the bankruptcy as it was before it, and the trustee of the deed still has an equitable charge on half the proceeds of the debtor's future professional earnings. *Ex parte Nichols* (2) is distinguishable, because that case concerned a business the profits of which were in a different position from the personal earnings of a professional man: see *In re Collins* (5), per Astbury J; *Affleck* v. *Hammond*, per Vaughan Williams L.J. (6). The earnings of a professional man who becomes bankrupt belong to him to the extent to which he needs them for his support, and the trustee in bankruptcy must show that his charge is on a surplus to which he is entitled to make a claim. [He referred to Williams on Bankruptcy, 15th ed., p. 365].

Aronson replied. *Cur. adv. vult.*

Jan. 29. FARWELL J. The question is whether, having regard to the terms of the deed of assignment, the trustee in bankruptcy is entitled to be paid the moneys earned by the debtor since the date of the adjudication. If this was a charge on the future profits of a business, there would be no doubt that the trustee in bankruptcy would be entitled to them. It is said, however, that, as this is a charge on the future professional earnings of the debtor, different considerations arise. I have considered with care the cases which were cited to me, and I am quite unable to find sufficient justification for saying that the principle applicable to the profits of a business does not apply to the present case. Accordingly, the trustee in bankruptcy is entitled to the relief which he seeks.

Solicitors: *Solicitor to the Board of Trade; W. Wallace Harden.*

(1) [1900] 1 Q. B. 122.
(2) (1883) 22 Ch. D. 782.
(3) (1888) 22 Q. B. D. 193.
(4) [1897] 1 Q. B. 17.
(5) [1925] Ch. 556.
(6) [1912] 3 K. B. 162, 165.

J. L. D.

UTHWATT J.

1943 Feb. 5.

RUSSELL *v.* WEINREB.

Emergency legislation — Mortgage — " Mortgage money "—Inclusion of interest — Possession of Mortgaged Land (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 108), *s.* 1, *sub-s.* 2.

The words " mortgage money " in s. 1, sub-ss. 1 and 2, of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, mean principal money and do not include interest due on the mortgage. Therefore, where interest on a mortgage is in arrear, the mortgagee is not precluded by the absence of a written demand for payment of it from obtaining an order for possession of the mortgaged property.

ADJOURNED summons.

Mortgagees of premises which had been charged by way of collateral security under a deed dated November 5, 1935, began proceedings by originating summons to recover possession of the premises. There had been default in the payment of interest due under the mortgage, but no written demand had been made by the mortgagees for payment of the arrears of interest. The mortgagor claimed the protection of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, and the question arose whether the mortgagees were precluded, by s. 1, sub-s. 2, of the Act (1), from obtaining an order for the possession of the mortgaged property by reason of the absence of a written demand.

Lindner for the mortgagees.
Astell Burt for the mortgagor.

(1) By Possession of Mortgaged Land (Emergency Provisions) Act, 1939, s. 1, sub-s. 1 : " Where any " land is the subject of a mortgage " made before September 3, 1939, " the mortgagee shall not be " entitled to obtain possession of " the land, unless default has " been made in payment of the " mortgage money or any part " thereof or of any interest thereon, " or there has been a breach on the " part of the mortgagor, or of " some person concurring in the " making of the mortgage, of any " obligation arising under or by " virtue of the mortgage, other " than an obligation to pay the " mortgage money or interest " thereon."

Sub-s. 2 : " For the purposes of " this section, default shall not be " deemed to have been made in " payment of any mortgage money, " unless a written demand for " payment has been served on the " person liable, and a period of " three months has elapsed since " the service of the demand : " Provided that this subsection " shall not apply where the mortgage money is repayable by " instalments."

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UTHWATT J. The question which I have to decide is whether the expression "mortgage money" in s. 1, sub-ss. 1 and 2, of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, includes interest due on the mortgage. "Mortgage money" has been defined from time to time in various Acts of Parliament. In the Conveyancing Act, 1881, it is defined as including interest as well as principal. The same definition is found in the Law of Property Act, 1925, and it appears, I think, in other Acts. That is of some assistance as showing the general way in which the phrase is used. I know of no Act where "mortgage money" is defined as relating only to the principal secured by the mortgage. The question, however, is always one of the construction of the particular Act which is under consideration, and I am of opinion that it is not used in the Act now before me in a sense which includes interest. It is clear from the phrasing employed in s. 1, sub-s. 1, that interest on the principal money is there treated as different from "mortgage money." Before a mortgagee is entitled to possession default must have been made "in payment of the mortgage money or . . . . of any "interest thereon." Further, it is, I think, obvious that the expression "mortgage money" in the proviso to sub-s. 2 can relate only to principal, because, in common experience, interest is not payable by instalments whereas principal money is often made so repayable. Having regard to these matters, it appears to me that on a right construction "mortgage money" in sub-s. 2 means principal money and does not include interest. It is admitted that interest is in arrear, and the result, therefore, is that the mortgagees are not precluded by the absence of a written demand for payment from obtaining an order for possession.

Solicitors: *Fisher, Dowson & Wasbrough; Phœnix, Levinson, Walters & Shane.*

J. L. D.

BENNETT J.

1943

Feb. 8.

In re GREGORY AND COMPANY (BRUTON STREET), LIMITED.

Emergency legislation — Company — Demand on company to pay debt—Application for leave to serve demand—Determination on application of question whether applicant creditor of company—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67) *s.* 1, *sub-s.* 2 (*a*) (*v.*).

Although in applications under the Courts (Emergency Powers) Acts for leave to exercise a remedy which the applicant claims to be entitled to enforce, it is not necessary, according to Chancery Practice Direction, dated October 26, 1939, for the application in the first instance to be supported by any evidence, yet where, on such an application, the respondent clearly proves that the applicant has no rights of any kind, the court ought to refuse the application.

The managing director of a company, who had been appointed in 1936 for seven years, was dismissed in 1942 by a receiver and manager appointed by debenture holders under a power in their debenture. He afterwards claimed salary for a period of three months after his dismissal, and applied under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*) (v.), for leave to serve a demand on the company, as a creditor, under s. 169 (1.) of the Companies Act, 1929, requiring the company to pay him the amount which he alleged to be due as salary :—

Held, that, there being clear evidence that he was not a creditor of the company for the sum claimed, leave must be refused.

In re Fraser-Taylor's Application [1942] Ch. 40, distinguished.

MOTION.

By a contract in writing dated December 4, 1936, the respondent, George William March, was appointed managing director of the applicant company, Gregory & Co. (Bruton St.), Ld., for seven years from that date at a salary of 900*l.* a year and an allowance for expenses of 100*l.* a year, payable on the first day of each month. The company's articles of association incorporated the regulations of Table A of the Companies Act, 1929, by reg. 68 of which the appointment of a managing director is "subject to determination ipso facto if he ceases "from any cause to be a director . . . ." The company had issued debentures, and in December, 1941, the debenture holders obtained leave from the court under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*) (ii.), to enforce their security by appointing a receiver and manager as they were empowered to do under the terms of the debentures which provided that the receiver so appointed should be the agent of the company. On September 22, 1942, the debenture holders appointed one Middleton receiver and manager. On September 23, Mr. Middleton informed the respondent that so far as he (Middleton) was concerned, he (the respondent) was a free agent and could not look to him for either employment or remuneration. On January 5, 1943, the respondent applied under s. 1, sub-s. 2 (*a*) (v.), of the Courts (Emergency Powers) Act, 1939, for leave to serve on the company a demand under s. 169, para. 1, of the Companies Act, 1929 (1), requiring the company to pay to him the sum of 250*l.*, being the amount due and payable to him by the company for three months' salary and expenses from October 1, 1942, to December 31, 1942, pursuant to the agreement of December 4, 1936. On January 21, the registrar made an order giving the respondent leave to serve the notice. The company moved to set aside the registrar's order.

J. A. Wolfe for the company. The decision of the registrar was wrong. The respondent should not be given leave to serve a demand on the company as a creditor under s. 169 (1.) of the Companies Act, 1929, since he is not a creditor of the company. He was dismissed in September, 1942, either expressly by the receiver, or automatically by the appointment of the receiver: *Reid* v. *Explosives Co., Ld.* (2); and, therefore, the salary and expenses which he claims are not due to him and he is not a creditor of the company for the amount thereof.

Wilfrid Hunt for the respondent. The registrar's decision was right. The receiver was simply the agent of the company, and his appointment out of court did not interfere with the respondent's contract of service which could only be determined at the end of its period. It is not for a receiver appointed out of court to break the company's contracts. On an application under the Courts (Emergency Powers) Acts for leave to proceed to exercise a remedy the court will not consider whether or not the right to exercise the remedy has arisen: *In re Fraser-Taylor's Application* (1).

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(1) By Companies Act, 1929, s. 169: "A company shall be "deemed to be unable to pay its "debts—(1.) if a creditor, by "assignment or otherwise, to "whom the company is indebted "in a sum exceeding 50*l.* then "due, has served on the company, "by leaving it at the registered "office of the company, a demand "under his hand requiring the "company to pay the sum so due, "and the company has for three "weeks thereafter neglected to "pay the sum, or to secure or "compound for it to the reasonable satisfaction of the creditor."

(2) (1887) 19 Q. B. D. 264.

BENNETT J. It is contended on behalf of the respondent that the court is not entitled to inquire into the question whether he is a creditor of the company. Mr. Wolfe, on the other hand, says that the court is entitled to inquire into that question, that he has filed evidence which shows that the respondent is not a creditor, and that on that ground the registrar's order should be discharged.

The practice, undoubtedly, is, in the first instance, not to require a person who applies for leave to exercise a remedy under the Courts (Emergency Powers) Act, 1939, to prove anything. The practice direction in the Chancery Division (2) provides that in applications under s. 1, sub-ss. 1, 2 and 3, of the Act, it shall not be necessary in the first instance to support the application by any affidavit, and that in applications under s. 1, sub-s. 2 (*a*), the mortgage deed, debenture or other document under which the applicant seeks to exercise his powers shall be produced to the master and be entered in his note and be read in the order. I do not, however, think it necessarily settled that in no circumstances can the court inquire into the question whether or not the person who is asking leave to exercise his powers has any power which he is entitled to exercise. It seems to me that where it is clearly proved that the applicant has no rights of any kind, the court ought not to give him leave to proceed. Each case must depend on its own facts, but, in my view, there is nothing in the Act which prevents me from inquiring whether the present respondent has any rights which he can exercise if leave is given. On the correspondence and the facts which are deposed to on affidavit, I have no doubt that in September, 1942, the receiver put an end to the respondent's contract of December 4, 1936. It is, therefore, not possible for the respondent to be a creditor of the company for salary and expenses for the period between October 1, 1942, and December 31, 1942. The respondent has never filed any evidence in any way controverting the case which is put forward on behalf of the company. In these circumstances, it seems to me that, as I am satisfied that the respondent is not a creditor of the company, I ought not to give him leave to take a step

(1) [1942] Ch. 40.

(2) Chancery Practice Direction: Ann. Pr., 1943, p. 2997.

which is preliminary to presenting a petition to wind up this company.

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GREGORY & CO. (BRUTON STREET), *In re.*

It is suggested that I cannot consider the question of the respondent's position because of the decision of Morton J. in *In re Fraser-Taylor's Application* (1), but I do not think the decision in that case affects the point which is raised here. All that the court decided there was that it was not incumbent on a mortgagee who applied for leave to exercise his remedy under the Courts (Emergency Powers) Act, 1939, to show a prima facie case that the powers which he sought leave to exercise had arisen. That is a wholly different matter from the present which raises the question whether the person who seeks the leave of the court to exercise a remedy has the qualities which entitle him to exercise the remedy. If it is clearly proved (and, in my judgment, in the present case it has been) that he does not possess those qualities, I think the court is entitled to act on that footing. For these reasons the motion succeeds, the order made by the registrar must be discharged, and the respondent must pay the costs of the motion.

Order discharged.

Solicitors: *Kenneth Brown, Baker, Baker; M. L. Moss & Son.*

H. L. L.

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(1) [1942] Ch. 40.

FRANK SMYTHSON, LIMITED *v.* G. A. CRAMP & SONS, LIMITED.

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Feb. 15.

Copyright—Literary work—Diary—Tables of general information—Original edition—Bringing information up to date—Defence that defendant was not aware of existence of copyright—Mistake of law——Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 1; *s.* 6, *sub-s.* 3; *s.* 8.

The plaintiffs and the defendants were both publishers of pocket diaries. The plaintiffs complained that the defendants, in a diary published by them, had infringed the copyright in the plaintiffs' "Liteblue" diary for 1942. The "Liteblue" diary, which was first published by the plaintiffs in 1932 for 1933, contained the usual diary pages, and these were prefaced and followed by pages containing information of the usual kind found in diaries—a calendar for the year, postal information, a selection of "days and

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"dates" for the year, tables of weights and measures, comparative time tables and a percentage table. It was admitted that in 1938 one Eckford, who had been employed by the plaintiffs, and was then employed by the defendants, copied the "Liteblue" diary word for word and published it under a different name for the defendants, and that that copied diary had been published annually since. In neither case had any alteration been made beyond the necessary bringing up to date of the information from year to year. The defendants contended (*a*) that the "Liteblue" diary could not be the subject of copyright, and (*b*) that they were entitled to the protection afforded by s. 8 of the Copyright Act, 1911, because, at the date of the infringement they were not aware and had no reasonable ground for suspecting that copyright existed in the work. Uthwatt J. held that there was no such application of skill and labour in the selection and presentation of the information in the "Liteblue" diary as to make it a literary work in which copyright could subsist, and he dismissed the plaintiffs' claim on this ground:—

Held, by the Court of Appeal, (1.) that the diary proper was in no sense a literary work, and that no copyright could subsist in the mere arrangement of the days and dates on the pages; (2.) by Lord Greene M.R. and MacKinnon L.J. (Luxmoore L.J. dissenting), that there was such an exercise of skill and labour in the selection and arrangement of the tables and information prefixed to the diary as to make them a subject of copyright; (3.) that, if copyright subsisted in the diary, it was in the original edition published in 1932, and that the mere bringing up to date each year of the information and the tables did not create a new copyright in each yearly edition; (4.) that s. 8 of the Copyright Act, 1911, did not invalidate the maxim "Ignorantia legis "neminem excusat," and, as the only matter relied on by the defendants under this head was their own mistake of law in assuming that no copyright could subsist in the plaintiffs' diary, s. 8 could not avail them.

Per Luxmoore L.J. Paragraphs (*a*) and (*b*) of sub-s. 3 of s. 6 of the Copyright Act, 1911, relate only to the presumption of title to copyright, not to the existence of copyright, and as the defendants put in issue the existence of copyright, there was no presumption in the plaintiffs' favour on that issue.

APPEAL from Uthwatt J.

The facts appear in the headnote.

Shelley K.C., *Aldous* and *Alan Stevenson* for the plaintiffs. The "Liteblue" diary as a whole is a work in which copyright subsists. The diary pages are so arranged that the placing of days and dates has a unique and distinctive character, and, as to the tables of information, although the information itself is public property, these have been selected from several sources, collated and arranged by Mr. Smythson. In some

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cases a proper abridgment had to be made. Mr. Smythson is now dead, and evidence is, therefore, not available as to the exact work and skill involved, but it must have been sufficient to entitle the work to copyright. [*Macmillan & Co., Ld.* v. *K. & J. Cooper* (1) was cited.] Under s. 6, sub-s. 3, of the Copyright Act, 1911 (2), moreover, copyright is presumed to exist, and by para. (*b*) of that sub-section the plaintiffs are to be presumed to be the owners of the copyright. It is for the defendants to rebut those presumptions, and they have not done so. The defendants, on the other hand, cannot rely on s. 8, for at best they have been guilty of a mistake of law in assuming that copyright could not exist in the plaintiffs' diary and they have taken no steps to ascertain the real position.

Pritt K.C. and *Gahan* (for *Leon*, on war service). There is obviously no copyright in the diary proper, for it is in no sense a literary work and the mere arrangement of the days of the month in a particular layout cannot make it so. The tables are no more than a commonplace selection of commonplace matter such as is found in all diaries of this sort. The selection of these precise items for inclusion involved no such "knowledge, labour, judgment or literary skill or taste," in the words of Lord Atkinson in *Macmillan & Co., Ld.* v. *K. & J. Cooper* (1) as would entitle the resultant selection to copyright. The defendants are accused of infringing the 1942 edition, but if copyright subsists at all it must be in the original edition for 1933. There can be no fresh copyright each year merely by the alteration of dates, etc., to bring the information up to date. Moreover, the person who originally copied the plaintiffs' diary is no longer in the service of the defendants, and there is no evidence that anyone responsible for the edition complained of had any reason to suppose that it was copyright matter or was aware of the existence of copyright. The defendants are, therefore, entitled to rely on s. 8 of the Act.

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(1) (1923) 93 L. J. (P. C.) 113.

(2) Copyright Act, 1911, s. 6, sub-s. 3: "In any action for "infringement of copyright in any "work, the work shall be presumed "to be a work in which copyright "subsists and the plaintiff shall be "presumed to be the owner of the "copyright, unless the defendant "puts in issue the existence of the "copyright, or, as the case may be, "the title of the plaintiff, and "where any such question is in "issue, then—(*a*) if a name purporting to be that of the author of the "work is printed on or otherwise "indicated thereon in the usual "manner, the person whose name "is so printed or indicated shall, "unless the contrary is proved, be "presumed to be the author of the "work; (*b*) if no name is so "printed or indicated, or if the "name so printed or indicated is "not the author's true name or "the name by which he is commonly known, and a name "purporting to be that of the "publisher or proprietor of the "work is printed or otherwise "indicated thereon in the usual "manner the person whose name "is so printed or indicated shall, "unless the contrary is proved, be "presumed to be the owner of the "copyright in the work for the "purposes of proceedings in respect "of the infringement of copyright "therein."

Sect. 8: "Where proceedings "are taken in respect of the "infringement of the copyright in "any work and the defendant in "his defence alleges that he was "not aware of the existence of the "copyright in the work, the "plaintiff shall not be entitled to "any remedy other than an "injunction or interdict in respect "of the infringement if the defendant proves that at the date "of the infringement he was not "aware and had no reasonable "ground for suspecting that copyright subsisted in the work."

Lord Greene M.R. It has been argued by Mr. Shelley that copyright could exist in the diary as a whole, which, for present purposes falls into two parts. One is the collection of tables inserted at the beginning, and the other is the general arrangement and layout of the body of the diary—the way in which the days and dates are set forth and the spaces for memoranda and so forth. In my opinion, the latter part of the diary is not good subject-matter for copyright. It is impossible to say that it is in any sense a literary work. The only part of the diary to which copyright could attach is the tables at the beginning. The question may be considered both with regard to individual tables and with regard to the collection or compilation of tables which the plaintiffs have selected. Uthwatt J., in dealing with this matter, said: "In my view, the contents of the 'Liteblue' diary in issue in "this case are such that the compilation—at any rate in part "—is susceptible of copyright." By that he means, I think, that a compilation of this character can, provided that the necessary amount of labour and skill has been expended, be the subject-matter of copyright, but he goes on: "I am "prepared to infer that the various lists and tables were drawn "from more than one source. I am not prepared to infer "that the preparation of any one of them was in fact the "original work of Mr. Smythson or of the plaintiff company. "I cannot see that the selection of lists and tables and the

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(1) 93 L. J. (P. C.) 113, 121.

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"arrangement of the diary are anything other than a common- "place selection of gobbets of information and a commonplace "arrangement of them, neither of which involved any real "exercise of knowledge, labour, judgment or skill." With all respect to Uthwatt J. I think he took too narrow a view. It seem to me clear that certain of the tables were original in the sense that they were arranged by somebody, and are not to be found elsewhere than in the "Liteblue" diary save in the admitted copy made by the defendants. In particular, the list of "days and dates" is unique, and the abridgment of postal information, although of a character common to diaries, is an individual abridgment. Copyright may well subsist in those two individual tables at least and possibly in others, but I do not propose to decide this matter on the basis of individual tables. The safer ground of decision appears to be that the collection of tables is a compilation which is entitled to copyright.

The principle which has to be applied is stated in a few words in the judgment of the Privy Council in *Macmillan & Co., Ld.* v. *K. & J. Cooper* (1), where Lord Atkinson said: "What is the precise amount of the knowledge, labour, "judgment or literary skill or taste which the author of any "book or other compilation must bestow upon its composition "in order to acquire copyright in it within the meaning of the "Copyright Act of 1911 cannot be defined in precise terms. In "every case it must depend largely on the special facts of that "case, and must in each case be very much a question of "degree." In the present case, Mr. Smythson, who was responsible for the compilation found for the first time in the plaintiffs' "Liteblue" diary, is dead, and, therefore, it is impossible to hear from him what amount of knowledge, labour, skill and judgment he put into the work of selection, but several matters appear to me to lead to the inference that a substantial amount of labour was required. Although collections of tables of information are a common feature of diaries, diaries differ completely in the type of table which the compilers think suitable. There is no common collection. The true inference appears to be that every person who publishes a diary exercises his own judgment in deciding what tables and what information will be of interest and use to purchasers of the diary, and, in making that selection, he has to consider not only that matter but also what space is

(1) 93 L. J. (P. C.) 113, 121.

available. We have here, therefore, a unique collection made by Mr. Smythson, and a not inconsiderable amount of evidence which shows that in compilations of this kind time has to be taken, labour expended, and skill and judgment exercised. As I say, I think that Uthwatt J. swept this part of the case aside rather too lightly.

There is one further matter which I think is not without importance. The diary in respect of which infringement of copyright is alleged is the 1942 "Liteblue" diary. The alleged infringing diary produced by the defendants is admittedly based on the copy made on behalf of the defendants by Mr. Eckford in 1938. Now why did Mr. Eckford copy the plaintiffs' diary in 1938? The inference seems to me clear that he did it to save himself trouble. If he had had to exercise independent judgment of his own and decide what were the tables which it would be useful to include, and had gone to the sources where the information was to be found, making abridgments where necessary, and selections where necessary, he would clearly, I think, have been put to considerable labour, and would have had to exercise skill and judgment of his own. Instead of doing that he appropriated the result of the plaintiffs' work and copied direct their diary in its entirety. It seems to me that, taking all these matters into consideration, it is established that there is a sufficient amount of skill, labour and judgment put into the selection of that group of tables to attract copyright. The 1942 diary of the defendants was not, of course, copied from the 1942 diary of the plaintiffs in the sense that that particular document was copied. Mr. Eckford took the tables in 1938 as they existed, and year by year those tables had to be brought up to date. That was done, and thus the defendants' 1942 diary was compiled, but the basis of the 1942 diary lay in the copying made by Mr. Eckford in 1938. In my judgment, therefore, the plaintiffs succeed on the issue of copyright, but only as regards the collection of tables inserted in the beginning of their diary. The work in which copyright is alleged to exist must, moreover, be the original "Liteblue" diary, i.e., the features of it, which, in my opinion, are subject to copyright, which have been produced ever since and were copied by the defendants. I do not intend to suggest that each edition of the diary is subject to copyright because the new editions merely bring the matter up to date.

The next matter which has to be mentioned is the argument presented on s. 8 of the Copyright Act, 1911. It is said that in 1942 the defendants were not aware that copyright subsisted and had no reasonable ground for suspecting that copyright subsisted in the "Liteblue" diary. In my opinion that argument cannot succeed. The defendants copied a work in respect of which, at the lowest, copyright was capable of subsisting, and they did so without inquiring or troubling themselves about the question whether the work was in fact entitled to copyright. I cannot see how the language of s. 8 can cover such a case. Not merely must a defendant who relies on that section show that he was not aware that copyright subsisted—and that, in my judgment, cannot protect him if his ignorance is due merely to a mistake in law—but he must have no reasonable ground for suspecting that copyright subsisted. The defendants, without making any inquiry or any investigation, resolved in their own favour all doubts as to the existence of copyright in this compilation. The section was never designed to protect people who act in that way. That disposes of the appeal.

MACKINNON L.J. I agree. That the defendants slavishly copied the printed matter in the plaintiffs' book is manifest. The only question, therefore, is whether the matter so copied is susceptible of being the plaintiffs' copyright. The matter copied is information as to various topics such as the compiler of such a diary invariably prefixes to the pages of the diary proper. Information of this sort is, of course, open to all the world as part of the stock of common knowledge. The compiler of this part of a diary is set two tasks: first, the selection of the topics, and, secondly, the expression of the written matter on each topic. The plaintiffs' compiler fulfilled the first task by selecting seven topics: (1.) a calendar for the year, (2.) a selection of " days and dates " for the year, (3.) postal rates, (4.) equivalents of metric and imperial weights and measures, (5.) lighting-up times, (6.) empire and foreign time table (i.e., the equivalent time to noon at Greenwich), and (7.) percentage table. The contents of (1.) and (3.) would, no doubt, be the same in any account of such a topic, but the contents of (2.), (4.), (5.), (6.) and (7.) would vary in the work of each independent compiler.

There are many authorities which discuss the question how much labour and skill exerted on non-copyright material is sufficient to create copyright in the resulting record. We were only referred to one, *Macmillan & Co., Ld.* v. *K. & J. Cooper* (1), in which many decisions are summarized and discussed. In that case it was held that merely to shorten a non-copyright original by omitting passages did not confer copyright in the shortened version, although the making of a shortened version in the language of the compiler may do so. But there was also copying by the defendants of notes added to the plaintiffs' version of the text, and it was held that that did infringe the plaintiffs' copyright in the notes. The notes were of a simple nature, such as any person of education would easily add to the text. Indeed, it is recorded in the judgment that the defendants contended that anyone could compile them by hasty references to Lemprière's Classical Dictionary. None the less, it was held that the plaintiffs in the notes had produced an original work which the defendant must not copy, however easy would have been his task in compiling similar notes for himself. What degree of labour and skill will suffice to create copyright in an original work must in every case be a question of fact. In the present case it is near the line, as is patent from the fact that I find myself in disagreement with Uthwatt J. and Luxmoore L.J., but, in my opinion, the plaintiffs are entitled to say that they have copyright in the eight pages of printed matter which the defendants appropriated, and that, therefore, they are entitled to succeed. I need hardly add that the plaintiffs' copyright exists only in these pages in their precise wording. They must not be encouraged to think that they can prevent the defendants or anyone else from printing similar disquisitions on the same topics if those disquisitions are independently compiled by their producers.

The defendants, as an alternative defence as to copyright, sought to rely on s. 8 of the Act of 1911. What will enable one who has infringed copyright to rely on that section is a very difficult question. The substance of the section appears to have been copied from s. 33 of the Patents and Designs Act, 1907. There is, I think, no case reported in which a defendant has successfully relied on s. 8. What the section contemplates is obscure, but I am certain that it is not intended to render void the ancient maxim "Ignorantia legis neminem excusat." One who has infringed copyright cannot rely on his ignorance of the law as giving him relief from liability under this section. In the present case the

(1) 93 L. J. (P. C.) 113.

only thing the defendants can rely on for that attempt is that they were ignorant of the law. The section, therefore, cannot avail them. I would allow the appeal.

Luxmoore L.J. I am unable to agree with my brethren on the question of the existence of copyright.

In the statement of claim the plaintiffs alleged that "they "are and at all material times have been the owners of the "copyright in" what they described by the phrase "diaries "of a distinctive character with a distinctive binding and "get up." The only other allegations material to the copyright issue are that: "The defendants have infringed and threaten "and intend to infringe the plaintiffs' copyright in the said "diaries by reproducing the same, or a substantial part thereof, "and by authorizing the reproduction thereof" and so on. The relief sought on the basis of these allegations is an injunction to restrain infringement of the copyright "in their diaries," and the consequential relief of delivery up and damages. It will be observed that there is a general claim to copyright in all diaries published by the plaintiffs without specifying any particular diary. I think it is plain that when a diary is published in the same form, or substantially the same form, from year to year there cannot be a new copyright for each separate year, and it seems to me to be essential to ascertain in which issue the copyright claimed to be infringed is said to exist. Obviously the original diary, if it is entitled to copyright, is the document on which the plaintiffs' title to copyright should be founded. Any subsequent alteration or addition may attract copyright, but the copying from a subsequent diary of tables of information appearing in the original diary would constitute an infringement of the copyright, if any, in the original diary. The "Liteblue" diary was first published in the latter half of the year 1932. Apparently at no time during the hearing before Uthwatt J. were the original diaries in which copyright was claimed specified or identified, but, when asked in this court to specify the diaries in which copyright was claimed, Mr. Shelley elected to rely on the plaintiffs' "Liteblue" diary for 1933, which was the first issue of diaries of that particular type. It is, I think, therefore, unnecessary for me to consider any other of the plaintiffs' diaries.

Mr. Shelley persisted in the claim that the defendants' diary infringed the plaintiffs' copyright, and that the plaintiffs

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were entitled to copyright in the words, type and layout of the diary. I am quite unable to appreciate any legal ground for a claim to copyright in the words, type or layout of the pages of what he called the diary proper. There can be no basis on which copyright can be claimed for the insertion of the days of the week and their dates in a diary, still less in the type selected and used or in the actual layout, for it is impossible to describe any of those features as literary or artistic work. If the plaintiffs are entitled to any copyright, it can be only in the tables of information at the beginning of their "Liteblue" diary. I agree that the individual tables, or some of them, might be entitled to protection as being original literary compilations, or the totality of the tables and information taken as one entirety might be entitled to protection as a literary compilation. As was pointed out in *Macmillan & Co., Ld.* v. *K. & J. Cooper* (1) the question what is the precise amount of knowledge, labour, literary skill or taste which the author of any book or other compilation must bestow on its composition to acquire copyright in it within the meaning of the Copyright Act, 1911, cannot be defined in precise terms. In every case the answer must depend largely on the special facts, and must be very much a question of degree. In the case quoted the subject-matter of the claim for copyright was a book entitled Plutarch's Life of Alexander, Sir Thomas North's translation, edited for schools by H. W. M. Parr. It consisted of detached passages from North's translation selected by the author, so as to be suitable for use in schools, the passages chosen being interspersed, where necessary, with notes to fill in the narrative, and the book also contained notes explanatory of the context and a glossary. Sir Thomas North's translation contained about 40,000 words, while Parr's selection comprised about 20,000 words of North's text. The respondents published an edition of North's translation of Plutarch's Life of Alexander the Great entitled Plutarch's Life of Alexander the Great, North's translation, edited with introduction, marginalia, notes and summary, by A. Darby. Darby's text contained selections from North's translation comprising about 27,000 words of the original text. All of the passages selected and published in Parrs' book were reproduced in Darby's book, and Darby's book also contained notes on the text. The Judicial Committee came to the conclusion that the appellants were not entitled

(1) 93 L. J. (P. C.) 113, 121.

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Luxmoore L.J.

to copyright in the selected passages, but were entitled to copyright in the notes. Lord Atkinson, on this point, said: "Their Lordships have no hesitation in holding that "there is no evidence in the present case to establish that an "amount of [knowledge, labour, literary skill or taste] has "been applied to the composition of the text of the appellants' "book as distinguished from the notes contained in it, to "entitle them to the copyright of it. As to the notes it is "altogether different." The tables in the "Liteblue" diary appear to be of the most commonplace type. Uthwatt J. referred to them, I think not unfairly, as "gobbets of information." They do not appear to have been selected on any definite plan. So far as we know, they may have come from one source or from a number of sources. How the compilation was made is left entirely to conjecture, for there is no evidence before the court from which it can be held, either directly or by inference, that any one of the tables included in the "Liteblue" diary was the original work of Mr. Smythson or of any other person. Nor is there any evidence with regard to the source or sources from which the tables were derived except in the case of the table headed "Metric and Imperial Weights and Measures," which obviously was derived either from a diary published by Harpers in 1930, or from the same source from which the compilers of Harpers' diary obtained his tables. Owing to his death some years ago, the plaintiffs were unable to call Mr. Smythson, who was said to be responsible for the compilation claimed and apparently there was no other person available. In the absence of more evidence than merely that of the existence of the tables of information as they appeared in the "Liteblue" diary for 1933 and as they continued through the succeeding years, it seems to me to be impossible for the plaintiffs to establish, to adopt Lord Atkinson's words from the case I have quoted, that the amount of knowledge, labour, judgment or literary skill or taste applied to the compilation of the tables and lists at the beginning of the "Liteblue" diary for 1933 entitles that compilation to copyright.

I agree with the view expressed by Uthwatt J. that, looked at apart from any evidence, the compilation for which copyright is claimed is nothing more than a commonplace selection or arrangement of scraps of information, neither of which involved any real exercise of labour, judgment or skill. Mr. Shelley was pressed, I think, by the absence of the evidence to which I have referred, for he, in the first place, based his claim to copyright on the fact that the circumstances were such that he was entitled under s. 6, sub-s. 3 (*b*), of the Copyright Act to be presumed to be the owner of copyright, and that the existence of that copyright was also to be presumed unless and until the contrary was proved by the defendants. This argument, I think, is unsound. Paragraphs (*a*) and (*b*) of sub-s. 3 of s. 6 refer solely to the question of title and not to the question of the subsistence of copyright, and nothing in the sub-section justifies the suggestion that the subsistence of copyright is to be presumed in any case which falls under either para. (*a*) or para. (*b*). The defendants have put in issue the existence of copyright and the plaintiffs' title to copyright. The plaintiffs are entitled to the benefit of the presumption as to title, but the presumption as to the subsistence of copyright conferred by the first part of sub-s. 3 does not apply, for the condition on which it rests has been removed by the defendants putting in issue the existence of copyright. The burden of proving that copyright subsisted, therefore, remains with the plaintiffs, and, in my judgment, they have not discharged the onus of proving its existence. Therefore, I agree with Uthwatt J. that the existence of copyright in the plaintiffs has not been established, and I would dismiss the plaintiffs' appeal.

Appeal allowed.

Solicitors for plaintiffs: *Henry Pumfrey & Son.*
Solicitors for defendants: *Rubinstein, Nash & Co.*

J. W. H.

UTHWATT J.
1943
Jan. 20; *Mar.* 3.

In re ORBIT TRUST, LIMITED'S LEASES.

Emergency legislation—War damage—Ground lease—Proportionate reduction of rent—Costs—Offers by landlord of minimum rent acceptable and by tenant of maximum rent payable—Landlord and Tenant (War Damage) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 10, *sub-s.* 1 (*c*)—*Landlord and Tenant (War Damage) (Amendment) Act,* 1941, (4 *&* 5 *Geo.* 6, *c.* 41), *s.* 10, *sub-s.* 1.

The jurisdiction conferred on the court by s. 10, sub-s. 1 (*c*), of the Landlord and Tenant (War Damage) Act, 1939, to fix the rent of premises which have been damaged by enemy action should be exercised on the principle that war damage is a calamity which is to be shared by the landlord and the tenant and that the rent to be fixed should reflect the fact of a common loss, and there is no reason for treating ground leases on a principle different from that to be applied to other leases. Where there are no special circumstances a practical way of giving effect to this principle is to ascertain the proportion borne at the date of the happening of the war damage by the annual value of the land as unaffected by the war damage to the annual value of the land as so affected and to reduce the rent proportionately. Further, in the absence of special circumstances, the rent so fixed should be fixed at the outset once and for all, and should run for the whole period beginning with the date when the notice of retention was served by the tenant and ending with the date on which the land is rendered fit, or, where there is served a conditional notice of retention which ultimately becomes an effective notice of disclaimer, ending with the date on which the lease is thereby determined. The position should be crystallized at the date of the happening of the war damage, and the court should not be asked to embark on a speculation on the future outlook for the property.

To enable the court adequately to deal with the question of costs, it is desirable in cases under s. 10, sub-s. 1 (*c*), that, either before the proceedings are brought or at an early stage in them, the landlord should make a firm offer of the least rent he is willing to accept and the tenant should make a firm offer of the highest rent he is willing to pay. There is no reason why, unless the parties so wish, the court should be informed of the terms of these offers until the amount of the rent has been fixed by the court and the question of costs comes to be decided.

ADJOURNED summonses.

In the first case, on April 21, 1936, the freeholders of certain property at Norwood, having erected thereon flats and garages, conveyed the property to Beulah Trust, Ld., for 83,000*l.* Langford Property Co., Ld., bought the share capital of Beulah Trust, Ld., for some 31,000*l.* and undertook to pay the liabilities of Beulah Trust, Ld., which amounted to some 84,000*l.*, being the purchase price of the property with incidental costs. On April 29 Beulah Trust, Ld., passed a resolution for voluntary winding-up and the property was conveyed to Langford Property Co., Ld., on the distribution of assets in the winding-up. On the same day Langford Property Co., Ld., conveyed the property to Orbit Trust, Ld., for 40,250*l.* Orbit Trust, Ld., then leased the property to Langford Property Co., Ld., for ninety-nine years from March 25, 1936, at a yearly rent of 1750*l.* On August 26, 1937, Orbit Trust, Ld., sold the freehold reversion to the applicants, the Royal Liver Friendly Society, for 40,250*l.* On September 29, October 10 and 31, 1940, and

March 15, 1941, the property was damaged by enemy action with the result that forty-seven flats and ten garages, out of a total of one hundred and seven flats and thirty-five garages, were rendered unfit within the meaning of the Landlord and Tenant (War Damage) Act, 1939. On August 29, 1941, after the passing of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, Langford Property Co., Ld., served on the applicants a conditional notice of retention.

In the second case, Lake Close, a block of flats at Wimbledon, was dealt with in a similar manner by the same parties. It was the subject of a ground lease to Langford Property Co., Ld., for ninety-nine years at a rent of 750*l.*, and the freehold reversion was vested in the applicants, the Royal Liver Friendly Society. The property was damaged by enemy action in October and November, 1940, one flat out of thirty-two flats and ten garages being rendered unfit for occupation.

In both cases the applicants applied under s. 10, sub-s. 1 (*c*), of the Landlord and Tenant (War Damage) Act, 1939 (1), that the court should fix the rent of the property. The annual value of the Norwood property immediately before the war damage was 4149*l.* gross and 3081*l.* rateable. The annual value immediately before the war damage of the forty-seven flats and ten garages rendered unfit was 1735*l*. gross and 1295*l*. rateable. The leases contained full repairing covenants by the lessees. The annual value of the whole Wimbledon property immediately before the war damage was 1700*l*. gross and 1350*l*. rateable, and that of the flat rendered unfit was 52*l*. gross and 42*l*. rateable.

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(1) By Landlord and Tenant (War Damage) Act, 1939, s. 10, sub-s. 1: "Where a notice of "retention is served or is deemed "to have been served in respect of "a lease, then, unless the notice of "retention is of no effect under "this Part of this Act or the "notice to elect by virtue whereof "the notice of retention is deemed "to have been served is of no "effect under this Part of this Act, "the lease shall have effect subject "to the following modifications ". . . . (*c*) Where the court is "satisfied, on the application of "the landlord made at any time "before the land has been rendered "fit, that part of the land is "capable of beneficial occupation, "the court may direct that there "shall be payable by the tenant "such rent, at such times and in "respect of such period as the "court may fix: Provided that "the amount of the rent fixed by "the court under this paragraph "shall not exceed such proportion "of—(i.) the annual value at the "time of the application of so "much of the land as is at that "time capable of beneficial occupation; or (ii.) the full annual "rent reserved by the lease; "whichever is the less, as the "period in respect of which the "rent is payable bears to a year."

By s. 13, sub-s. 1: "In relation "to a ground lease, this Part of "this Act shall have effect subject "to the modifications specified in "this section."

By Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 10, sub-s. 1: "The principal "Act shall apply to ground leases "in like manner as it applies to "other leases, and accordingly "ss. 13 and 14 of that Act shall "cease to have effect."

Denning K.C. and *Granville Slack* for the trustees of the applicant society. The rent payable should be the full rent reserved. This is a ground lease. The rent is paid for the use of the land, and the ground lessee takes the risk of damage to buildings on it. The ground landlord is in the position of an investor, while the lessee is a speculator. If no part of the land is capable of beneficial occupation, then no rent is payable. The words in s. 10 "at the time of the application" are inserted to meet a case where the value of the property has increased or diminished since the date of the lease. Here the value has increased, and, although there has been some damage, it is now greater than before the war. The rent cannot be reducible in such a case as the present as, if it were, consequences would follow which the legislature could not have intended. For instance, if both the freehold and the reversionary interests had been mortgaged, as is often the case, a reduction in the rent would result in the security of the mortgagee of the lease being improved while that of the mortgagee of the reversion would be depreciated. That could not have been intended.

Charles Romer K.C. and *Jopling* for the Langford Property Co. According to the argument put forward on behalf of the applicants, if the value of the premises which had been damaged happened still to be more than the rent reserved, the whole loss ought to fall on the ground lessees. Ground leases were excluded from the general operation of the Landlord and Tenant (War Damage) Act, 1939, but when, by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, they were included in the principal Act, they were so included without qualification of any kind. It is contrary to the whole principle of the Act of 1939 that the ground lessees should continue to pay the whole rent. It is said that a ground rent ought to be still payable in full, because, although the property is damaged, the ground is still there, but it is not there in the same sense. It is not fully capable of beneficial occupation.

The rent should be apportioned as between the values of the portion destroyed, and that left undamaged. The Acts are primarily for the relief of tenants of bombed-out property, and they are not concerned with any effect which their operation may have on mortgage securities or any such extraneous matters. The lessees have had their property damaged and have lost profits, and there is no reason shown why the applicants should be exonerated altogether.

Denning K.C. in reply. If war damage is made good by the lessee, and he gets compensation, the ground rent is still payable in full, and no case for any reduction arises.

Cur. adv. vult.

Mar. 3. UTHWATT J. read a judgment in which he stated the facts, and continued: The conflicting contentions are—(*a*) on the part of the tenant, that the loss should be shared between landlord and tenant, and the rent, accordingly, reduced, and (*b*) on the part of the landlord, that the whole loss should be thrown on the tenant, and the old rent maintained. In each case the lease has a long term to run and the rent reserved is well secured. Each falls within the usually accepted conception of a ground lease. Commercially the interest of the reversioner in each case may be properly regarded as a ground rent and as a ground rent only, for the value of the reversion—apart from the right to receive the rent—is practically nothing and the acquisition of reversions such as exist here would in substance be an investment of moneys to return a certain yield and not an adventure into the property market.

Under the Landlord and Tenant (War Damage) Act, 1939, ground leases as therein defined were by s. 13 excepted from the unqualified operation of the general provisions of that Act relating to notices of disclaimer and retention. The tenant was not entitled to serve any notice other than a notice of disclaimer, and could serve a notice of disclaimer only if authorized to do so by the court. The court could only authorize the service of the notice if satisfied, having regard to all the circumstances of the case, including the length of the unexpired term of the lease and any offers of extension of the term made by the landlord, that it was equitable to allow the tenant to disclaim the lease. If leave was given, the court was empowered to impose conditions as to payment of compensation and otherwise. The result was that in no event was the rent liable to be reduced, but, where fairness to the tenant could not otherwise be secured, the lease could be disclaimed. The landlord was entitled either to the full rent or to the property freed from the lease. To my mind, the section was based on, and gave effect to, the view that reversions on ground leases as defined in the Act were to be regarded primarily as investments to be accorded special protection and not as in essence proprietary interests which ought to be affected by the misfortunes happening to the land. It is to be observed that this special protection was very limited in its operation, for the definition of ground lease in the Act is narrower in scope than the ordinary conception of a ground lease. No lease was under the Act a ground lease if the rent were higher than the proper rent at the beginning of the lease for a lease of the ground without the buildings. Many ground leases in the ordinary acceptance of the term fall outside that definition. The amending Act of 1941 fundamentally alters this position. Sect. 10 of the Act of 1941 repeals ss. 13 and 14 of the Act of 1939 and provides that the Act of 1939 shall apply to ground leases "in like manner as "it applies to other leases." The result is that all leases, whatever their rent, are subject to the general scheme of the Act of 1939. The distinction in principle made by the Act of 1939 between ground leases and other leases entirely disappears. The landlord under a ground lease where war damage causing unfitness occurs can no longer say: "Non "haec in fœdera veni." In exercising the jurisdiction under s. 10 there is no reason to be found in the Act for treating ground leases on a principle different from that proper to be applied to other leases.

To determine the principle on which the court should act under s. 10 of the Act of 1939 in fixing a rent, it is necessary to consider that section in light of the general effect of the Act. The starting point of s. 10 is the provision in sub-s. 1 (*b*) that for the period between the date of service of notice of retention and the date when the land is rendered fit, no rent is to be paid. That starting point was obviously necessary if every possible case of unfitness caused by war damage was to be provided for. Sub-sect. 1 (*c*) provides that, subject to the maximum, the rent shall be such as the court may direct, and that the rent shall be payable in respect of such period as the court may fix. It is implicit that the court is to try to fix a rent which is fair and equitable in light of all the relevant circumstances. The maximum yearly rent specified in the section is, whichever shall be the less, the annual value, at the time of the application of the landlord to fix a rent, of so much of the land as is at the time capable of beneficial occupation, or the full annual rent reserved. The only point that can be made on the maximum is that it contemplates that a case may arise where the full reserved rent may be payable notwithstanding that the premises have been rendered unfit by war damage. There is not much in this point when it is recalled that only comparatively small damage may have the effect of rendering the premises unfit. Both the minimum and the maximum are dictated by the need to give the court full power to do justice. From the section, taken by itself, I fail to get any guidance on the point of principle I am asked to decide, and it is necessary to look at the general scheme of the Act of 1939.

Part I. of the Act of 1939 is to the effect that, whatever the terms of the bargain between the landlord and the tenant, neither of them is to be liable to make good war damage. It follows to my mind that in fixing a rent under s. 10 it is irrelevant to consider whether it was the landlord or the tenant who, under the lease, was subject to a liability to repair which comprehended war damage, but beyond this the provisions of Part I. are not of any assistance in determining the matter in hand. Part II. of the Act deals with the case where premises held under the lease are by reason of war damage rendered unfit. The effect of the provisions is in substance that it lies with the tenant to make the first substantive move, that no tenant can be compelled to remain against his wish unless the landlord assumes the burden of rendering the premises fit, or is entitled to remain against his landlord's wish unless he, the tenant, is prepared to assume that burden. The effect of the Act of 1941 as to conditional notices of retention is that the tenant may serve a notice which will entitle the tenant to retain his tenancy until the nature of the payment to be made under the War Damage Act, 1941, has been decided, and then his notice operates thenceforth as a notice of retention if that decision be that a cost of works payment is to be made, and as a notice of disclaimer if a value payment is to be made. To my mind, the general basis on which this part of the Act proceeds is that war damage causing unfitness is treated as a common calamity to be shared by the landlord and the tenant. Taking this view, I think that the jurisdiction conferred by s. 10 should be exercised on the lines that the rent to be fixed should reflect the fact of a common loss.

It is, I think, worth recalling that in the Statute of Charles II. passed to meet the position caused by the Fire of London, Parliament made a declaration on this point. That position was similar in character to the present position. The destruction in London caused by the fire was comparable to that which the present legislation is designed to meet. In a court of law the fire was held to be attributable to enemy action. It was recognized that the enforcement of covenants to repair would cause hardship, and legislation was felt to be necessary. Pepys in his Diary gives part of the history. He says: "But "my Lord Crew was discoursing at table how the judges "have determined in the case whether the landlords or the "tenants (who are, in their leases, all of them generally tied to "maintain and uphold their houses) shall bear the loss of the "fire; and they say that tenants should against all casualties "of fire beginning either in their own or in their neighbour's "(premises); but, where it is done by an enemy, they are "not to do it. And this was by an enemy, there having been "one convicted and hanged upon this very score . . . ." And then he adds, characteristically: "This is an excellent "salvo for the tenants, and for which I am glad, because of "my father's house." This entry, appropriately enough, appears, under date "5th November." The point of law mentioned by Pepys was, so far as I have been able to ascertain, never formally argued and decided. The matter was set at rest by Parliament. The statute 18 & 19 Car. II., c. 7, drafted by Sir Matthew Hale, then Chief Baron of the Exchequer, set up the Court of Fire Judges which was empowered to cancel leases, order new leases and to grant extended terms, and the declaration to which I have referred is contained in the preamble, which runs as follows: "Whereas "the greatest part of the Houses in the City of London and "some in the Suburbs thereof have beene burnt by the dreadfull "and dismall Fire which happened in September last Many "of the Tennants, Under tennants or late occupiers whereof "are lyeable unto Suites and Actions to compell them to "repaire and rebuild the same and to pay their Rents as if the "same had not beene burned and are not releivable therein "in any ordinary course of Law and great Differences are like "to arise concerning the said Repaires and new Building of "the said Houses and payment of Rents which if they should "not be determined with all speede and without charge would "much obstruct the rebuilding of the said Citty. And for that "it is just that every one concerned should beare a propor-"tionable share of the losse according to their severall interests "wherein in respect of the multitude of cases varying in their "circumstances noe certaine generall rule can be prescribed." The method adopted by Parliament for dealing with the problem raised by the destruction of property caused by enemy action in this war differs somewhat from that adopted by Parliament in the case of the problem arising from the Fire of London, but I see no reason for thinking that there is not implicit in the legislation of 1939 the principle of sharing loss which Parliament proclaimed as just in 1666.

It is convenient here to deal with one argument put forward by Mr. Denning. He correctly pointed out that where there are mortgages on the leasehold interest and also on the reversion —a likely event in the case of ground leases—the mortgage of the reversion is a better security than the mortgage of the lease, for, unless the rent be paid, the lease is liable to forfeiture. The mortgagee of the reversion has either the security of a reversion in respect of which the rent is paid or of the fee simple freed from the lease. If the rent were reduced, it would improve the security of the mortgagee of the lease and worsen that of the mortgagee of the reversion. That, he argued, could not have been intended. The answer given by Mr. Romer to this argument is, I think, right, namely, that the Act, in Part II., set out to modify the relation between landlord and tenant and that relation only, that it did not attempt to follow up the matter in all its consequences by dealing with the position of mortgagees and mortgagors inter se in any way, and that the circumstance that either party might have mortgaged his interest was not on the construction of the Act material in determining the general question whether a common loss to the landlord and tenant should be the basis on which the jurisdiction given by s. 10 should be exercised.

Accepting the general principle that the war damage is to be regarded as a common loss, it appears to me that where there are no special circumstances a practical way of giving effect to the principle is to ascertain the proportion borne at the date of the happening of the war damage by the annual value of the land as unaffected by the war damage to the annual value of the land as so affected and to reduce the reserved rent proportionately. This, indeed, was conceded by Mr. Denning as being the correct principle to apply if he were wrong in his substantive contention that the loss should fall entirely on the ground lessee. Where there are special circumstances the figure so obtained should, in my view, be treated as a starting point. Further, unless there are special circumstances, I think that the rent so fixed should be fixed at the outset once and for all, and should run for the whole period beginning with the date when the notice of retention was served and ending with the date on which the land is rendered fit, or, where there is served a conditional notice of retention which ultimately becomes an effective notice of disclaimer, ending with the date on which the lease is thereby determined. Put in another way, I think that the position should be crystallized at the date of the happening of the war damage, and that the court should not be asked to embark on a speculation on the future outlook for the property.

Leaving aside the question raised by the comparatively small damage in the second case, there are not, in my view, any relevant special circumstances in either case. For the reasons I have given, I regard as irrelevant the incidence of the original covenant to repair, the fact that the lease is a ground lease in the common acceptance of the term, and the question whether either lease was or was not a ground lease within the meaning of the Act of 1939 is a matter on which no evidence was given. I see no reason for treating the position created by a conditional notice of retention differently from that created by a notice of retention which is unconditional. My attention has not been drawn to any particular facts relating to the nature of the damage suffered which might bear on the propriety of departing from the rule of proportion. Further, it is not suggested that the annual value at the date of the damage of either property had fallen by reason of the failure of the tenant before that date to perform the covenants in the lease. Lastly, I regard the method in which in the present cases the leases were created as irrelevant, and I would regard the actual payment of a premium on the granting of a lease as equally irrelevant, for the court is concerned with apportioning the loss between the interests in the land as they happen to exist at the relevant date.

I have already stated the figures of value. In the first case the proportionate sum, 1295 over 3081 multiplied by 1750*l.* works out at 1014*l.* I fix the annual rent at 1014*l.*, to be paid from the date of the service of the notice of retention for the period I have mentioned. That rent is to be paid by the instalments and on the days specified in the lease, except that any arrears due to date are to be paid within fourteen days from to-day. To safeguard the position as respects unforeseeable happenings in the future, the payment directed will be subject to any further order. In the second case, the damage was small. The property comprised thirty-two flats and ten garages and only one flat was rendered unfit. The application of the rule of proportion results in a rent of 727*l.* as compared with a former rent of 750*l.* The question is whether I should regard the damage as a "rub of the green" not calling for any adjustment in the amount of the reserved rent. In a case where all the property in the lease is used and valued as a single unit I should be inclined to take the view that a depreciation in annual value of the order of 3 per cent., as in this case, or, indeed, a higher percentage, did not call for a departure from the original rent, but in the present case the property affected by the war damage is in substance a distinct property capable of separate valuation and normally separately valued, and I see no reason why the rule of proportion should not be applied. Nor do I think that an annual sum of 23*l.*—the difference between 750*l.* and 727*l.*—payable for an undefined term not necessarily ending with the war, falls within the de minimis rule. I, accordingly, fix the rent at 727*l.*, that rent to be payable on the same terms as I have mentioned in the first case.

I desire to refer to one general matter. In the present case the parties have negotiated openly. Frequently negotiations take place without prejudice and the court, in dealing with the question of costs, is then somewhat at a disadvantage. It would be a good practice, which I wish to see followed in any other cases which may come before me, if either before proceedings are brought, or at an early stage in the proceedings, the landlord made a firm offer of the least rent he was willing to accept and the tenant made a firm offer of the highest rent he was willing to pay. There is no reason why, unless the parties so desire, the court should be informed of the terms of these offers until the amount of the rent has been fixed by the court and the question of costs comes to be decided. This practice will enable the court adequately to deal with the question of costs, and it has other considerable advantages.

[The applicants were ordered to pay three-quarters of the respondents' costs.]

Solicitors: *Montagu's & Cox & Cardale, for Bremner, Sons & Corlett, Liverpool; Wedlake, Letts & Birds.*

H. L. L.

In re ADAMS.

SIMONDS J.
1943
Mar. 15.

Infant—Settlement—Post-nuptial settlement—Sanction of court—Infant not a ward of court—Infant Settlements Act, 1855 (18 & 19 *Vict. c.* 43), *s.* 1.

The court has jurisdiction under the Infant Settlements Act, 1855, s. 1, to sanction a post-nuptial settlement made on the marriage of an infant who has attained the appropriate age specified in s. 4 of the Act, whether or not the infant be a ward of court.

In re Potter (1869) L. R. 7 Eq. 484, considered.

CHAMBERS summons.*

By the Infant Settlements Act, 1855, ss. 1 and 4, a male infant not under the age of twenty years or a female infant not under the age of seventeen years may, with the sanction of the court, make a valid settlement of property on or in contemplation of marriage. An infant spinster, more than seventeen years of age, but not a ward of court, having married, took out ex parte (by her mother) a summons under the Act asking that a proper settlement of her property might be sanctioned by the court, submitted proposals therefor, and asked that she might be at liberty to execute such settlement.

In Daniell's Chancery Practice, 8th ed., p. 997, it is stated that the court "has no jurisdiction to settle the property "of an infant who has married after she was of a competent "age to contract marriage, and who was not a ward of court": *In re Potter* (1). In Seton's Judgments and Orders, 7th ed., p. 1016, it is stated: "Where the infant is not a ward of "court, and does not consent to the application, there is "no jurisdiction under the Act or otherwise to direct a "post-nuptial settlement."

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(1) (1869) L. R. 7 Eq. 484.

* Reported by the direction of the judge.

SIMONDS J.

1943

ADAMS, *In re.*

Belsham, for the applicant, referred to *In re Sampson and Wall, Infants* (1); *In re Phillips* (2).

SIMONDS J. said that he was satisfied that there was jurisdiction in the court under the Infant Settlements Act, 1855, to sanction a post-nuptial settlement made on the marriage of an infant whether or not the infant was a ward of court. If the passage in Daniell's Chancery Practice referred to was meant to indicate that the jurisdiction existed only where the infant was a ward of court he did not agree with it. He doubted whether *In re Potter* (3), intended so to decide, and he preferred the statement in Seton's Judgments and Orders, as to the effect of that case. In *In re Sampson and Wall* (1), the Court of Appeal decided that a settlement of an infant's property might be made under the Act on the occasion of his or her marriage after the marriage had taken place. That decision was reached on the construction of the Act and its construction could not be affected by the question whether the infant was a ward of court or not.

Solicitors: *Warmingtons and Trevor Jones.*

(1) (1884) 25 Ch. D. 482.
(2) (1887) 34 Ch. D. 467.
(3) L. R. 7 Eq. 484.

H. L. L.

C. A.

1943

Mar. 1.

In re SUBURBAN AND PROVINCIAL STORES, LIMITED.

Company—Variation of shareholders' rights—Cancellation—Time limit for application—Support at that date of fifteen per cent. of shares affected—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 61, *sub-ss.* 1, 2.

An application to the court under s. 61, sub-ss. 1 and 2, of the Companies Act, 1929, to cancel a variation of shareholders' rights must be made, not only within seven days after the consent to or resolution for such variation was given or passed, but also either by the actual holder or holders, at the date of the presentation of the petition, of fifteen per cent. of the shares of the class affected who did not consent to or vote in favour of the resolution, or by a person who, at that date, has been appointed in writing by the holders of fifteen per cent. of those shares, and that appointment cannot be validly given or completed after the presentation of a petition by a shareholder not then qualified to present it.

C. A.
1943
SUBURBAN AND PROVINCIAL STORES, LD., *In re.*

APPEAL from Bennett J. (1).

At meetings of different classes of shareholders in Suburban and Provincial Stores, Ld., and of the company, held on January 13, 1943, resolutions were passed in pursuance of powers contained in the articles of association materially varying the rights of the ordinary stockholders. A petition for cancellation of the variation was presented under s. 61, sub-ss. 1 and 2 of the Companies Act, 1929 (2), by Peter Lind, the holder of 400*l*. out of 3,000,000*l*. ordinary stock in the company, who did not consent to or vote in favour of the resolutions. The petition was presented on January 20, and it was stated therein that it had not been possible to obtain the appointment in writing by holders of fifteen per cent. of the ordinary stock who had not consented to or voted in favour of the resolution, but that it would be obtained without any delay. The company moved to strike out the petition and remove it from the file. When the motion came before Bennett J., on February 9, the petitioner had received the support of well over fifteen per cent. of the ordinary stockholders to the petition. Bennett J. struck the petition out, on the ground that, the petitioner having no locus standi at the time of presentation, it was not proper to leave on the file a petition which could not possibly succeed and ought to be regarded in that sense as an abuse of process. He gave leave to appeal, and the petitioner appealed.

Valentine Holmes for the petitioner. Bennett J. was wrong in striking out the petition at this stage for it is not clear that it must fail. As to the necessity of having the appointment completed before the presentation of the petition, there is a divergence of view between Buckley on Companies, 11th ed.,

(1) [1943] W. N. 47.

(2) By Companies Act, 1929, s. 61, sub-s. 1: "If .... the rights "attached to any such class of "shares are at any time varied, "the holders of not less in the "aggregate than fifteen per cent. "of the issued shares of that class, "being persons who did not consent to or vote in favour of the "resolution for the variation, may "apply to the court to have the "variation cancelled, and, where "any such application is made, "the variation shall not have "effect unless and until it is "confirmed by the court."

Sub-sect. 2: "An application "under this section must be made "within seven days after the date "on which the consent was given or "the resolution was passed, as the "case may be, and may be made on "behalf of the shareholders entitled "to make the application by such "one or more of their number as "they may appoint in writing for "the purpose."

p. 132, and Stiebel's Company Law and Precedents, 3rd ed., p. 707. On the principle that the interpretation which will make the statute effective is to be preferred, it is submitted that, if the petition is lodged within seven days, the requisite appointments may be made at any time before the hearing. Otherwise the section is valueless, for the limit of seven days renders it almost impossible in the case of a large company to collect the requisite appointments. If the petitioner did not have full authority when he made the application those on behalf of whom he acted could, and did, subsequently ratify his action.

Roxburgh K.C. and *Cecil Turner*, for the company, were not called on to argue.

LORD GREENE M.R. The jurisdiction of the court to stay an action in limine on the ground that it is an abuse of the process of the court is one which must be exercised with the greatest care, for an action should not be stopped if there is a presentable case, however unlikely it may be to succeed. On the other hand, there are cases in which the plaintiff cannot possibly succeed and has no right to bring proceedings. The present matter, in my opinion, falls into the latter class.

The only question for our determination arises on the construction of s. 61 of the Companies Act, 1929, under which the petition purports to be presented. That, a new section, was intended to deal with the misuse of the rights of majorities in connexion with resolutions varying rights attaching to shares of a particular class. The section confers on a specified proportion of the holders of shares of the class affected a right to bring the matter before the court, which can cancel the resolution for the variation if it thinks proper to do so.

It is argued by Mr. Holmes that an aggrieved shareholder who holds less than fifteen per cent. of the shares affected by such a resolution and who presents a petition within the seven days prescribed by s. 61, sub-s. 2, is entitled to proceed with that petition if, after its presentation, he obtains authority from the number of shareholders which is required to make up fifteen per cent. of the aggregate holding, the argument being that that authority operates retrospectively in the same way as a ratification operates when an act has been done in terms on behalf of a person who has not at the time given authority for it to

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Lord Greene M.R.

be done on his behalf. In my opinion, that construction of the section is manifestly wrong. The holding of fifteen per cent. of the shares of the class affected, either by the petitioner or by a group of shareholders, is a necessary prerequisite to the commencement of proceedings under the section. If more shareholders than one make up the necessary fifteen per cent. they can either all join in the presentation of a petition or appoint one or more of their number in writing to make the application on their behalf, but in any case there must be a qualified shareholder or a qualified group of shareholders who, either by themselves or by their appointed representative or representatives, are the persons instituting the proceedings at the time when the proceedings are instituted. If this matter is regarded on the lines of a pleading, the title to sue is purely statutory. If an individual is suing, he must show his title to sue on the face of his petition. Under the statute that title is derived from one of two alternative states of affairs. If he is himself the holder of fifteen per cent. of the shares affected, he has a title to sue, but, if he is not, the only way in which he can obtain a title to sue is by having the authority in the statutory form—namely, an appointment in writing—from the number of shareholders necessary to make up fifteen per cent. of the shareholding affected. The petition would be demurrable unless on the face of it it showed a title in the petitioner to sue, that title taking one or other of the two forms which I have mentioned.

In the present case, when one looks at the attempt which the petitioner made to bring himself within the statute and to make his petition good on the face of it, the vice of it appears in the plainest possible manner. He states that he is the holder of ordinary stock to the amount of 400*l.* That clearly gives him no title to present this petition. He goes on to say: " It "has not been possible to obtain the appointment in writing "by holders of fifteen per cent. of the issued ordinary stock who "did not consent to or vote in favour of the resolution to make "this application on their behalf, but this appointment will be "obtained without delay." In other words, he is saying: "I have not got any title to present this petition at the present "moment, but I hope to get it retroactively at some future "time." He adds this curious sentence: "Your petitioner "makes this application on behalf of the shareholders entitled "to make it." I do not know what that means. The shareholders entitled to make the application would be the holders of fifteen per cent. of the ordinary stock, but the petitioner does not state that he has authority to act on behalf of fifteen per cent. of that number of shareholders.

The petition, therefore, appears to me to be bad in law on the face of it. I may cite, not as an authority, but to say that, in my opinion, it is perfectly correct, a passage from the Annual Practice, 1942, p. 1032. Among the matters specified as necessary to be included in such a petition as this, is: "The "appointment of the petitioner by the necessary percentage of "dissentients, unless the petitioner himself holds fifteen per "cent. of the shares of the class." That, in my opinion, is right and common form because without an allegation to that effect the petitioner does not show his title to sue.

It is said that the section cannot bear the meaning which I have placed on it because, if it did, the seven days allowed to obtain the appointment by the holders of fifteen per cent. of the shares would be insufficient for that purpose, and, therefore, the section would be ineffective. In my opinion, there is no substance in that argument. In the great majority of cases such as this, where there is serious opposition, that opposition has been organized beforehand. In the present case it had been very carefully organized. There was a committee which had been circularizing the dissentient stockholders and was in active operation before the meeting took place. It would have been possible for that committee, having regard to the proxies which it had obtained, to ensure that the necessary fifteen per cent. of stockholders was available within the seven days, assuming that fifteen per cent. of them were prepared to act. The period of seven days mentioned in s. 61, sub-s. 2, is peremptory. There is no power in any court to extend that period. The object of the provision is clear. It is to make certain that applications of this kind should be brought with the greatest promptitude. If that were not done, dealings in shares might be held up indefinitely while the decision of the court was being awaited. In connexion with that it is worth pointing out that under s. 61, sub-s. 4, the decision of the court on any application under sub-ss. 1 and 2, is to be final. I only refer to these matters to meet the argument that there is some practical impossibility in obtaining an appointment under this section unless it is to be construed as Mr. Holmes would have it construed. In my opinion, Bennett J. took the right view. The point raised by the petitioner is clearly unarguable, and Bennett J. took the right course in ordering the petition to

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be struck out and removed from the file. The appeal, accordingly, must be dismissed, with costs.

MACKINNON L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors for petitioner: *Swann, Hardman & Co.*
Solicitors for the company: *Clifford-Turner & Co.*

J. W. H.

Considered. In re RIDLEY [1950] 1 Ch. 415

In re ANSTEAD.

GURNEY *v.* ANSTEAD.

UTHWATT J.
1943
Feb. 16.

Administration—Estate duty—Incidence—Solvent estate—Order of application of assets—Liability of legacies to bear duty in exoneration of residue—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *s.* 53, *sub-s.* 3 (*c*); *sch. I., part II., para.* 8 (*b*).

In the administration of the estate of a testator under the Administration of Estates Act, 1925, where the estate is solvent, the will contains no specific directions for the payment of legacies, testamentary expenses, or debts, and no property is undisposed of, the first charge on the personal estate is to set aside out of residue a fund to satisfy pecuniary legacies. The debts and funeral and testamentary expenses must then be paid out of the balance of the residue of the personal estate together with such proceeds of the sale of real estate as may be required to make up any deficiency in personalty. The first fund will only become liable to estate duty if the second fund is exhausted.

Sect. 53, sub-s. 3 (*c*), of the Administration of Estates Act, 1925, by which: "Nothing in this Act shall . . . . (*c*) alter the incidence of any "death duties," and sch. I., part II., para. 8 (*b*), to the Act (which provides: "This part of this schedule does not affect the liability "of land to answer the death duty imposed thereon in exoneration "of other assets"), do not provide a guarantee that in no case will the new order of application of assets directed by the Act affect the incidence of death duties in a particular case as a matter of administration. The purpose of these provisions (no doubt inserted ex majore cautela) is to preserve the general rules as to the incidence of death duties, such as the rule that the real estate bears its own estate duty, but, in applying these general rules to the facts of a case, regard must be had to the new directions as to the order of administration of assets contained in sch. I. to the Act.

UTHWATT J.

1943

ANSTEAD, *In re.*
GURNEY
v.
ANSTEAD.

ADJOURNED SUMMONS.

By his will dated May 26, 1938, the testator, Robert Anstead, gave to his wife a legacy of 10,000*l.* free of duty in priority to all other legacies, and devised his house "Inglenook" to his trustees upon trust to permit his wife to reside there during her life, the trustees defraying all outgoings in respect of the house at the expense of the testator's estate. The testator also gave to his wife an annuity of 600*l.* free of tax and directed his trustees to provide for this annuity and for the outgoings by appropriating a sufficient part of his residuary personal estate. The testator then bequeathed numerous pecuniary legacies (not free of duty) amounting in value to 45,000*l.*, and he gave the residue of his real and personal estate upon trust to pay certain further legacies (not free of duty) of a value of about 6000*l.* and to divide the ultimate residue among certain named beneficiaries of whom the wife was one. There was no trust for sale of residue, and no express direction for the payment of legacies, testamentary expenses or debts. The testator died on March 15, 1940. His estate was sworn for probate at 111,000*l.*, of which about 95,000*l.* represented residuary personalty and about 15,000*l.* residuary real estate. The residuary personalty was insufficient, after appropriating a fund thereout to answer the wife's annuity and the outgoings, both to satisfy the testator's debts and testamentary expenses (which included 23,000*l.* estate duty on the personalty) and to provide in full for the pecuniary legacies. The testator's executors took out this summons to determine (inter alia) whether any part of the estate duty payable on the residuary real estate was to be charged against the pecuniary legacies other than the legacy to the wife.

Jopling for the executors.

Michael Albery for the wife. If in due course of administration the pecuniary legacies are partly payable out of real estate, then to that extent they must bear their own estate duty: *In re Owers* (1). If the testator had died before 1926, the testamentary expenses would have been charged primarily on the residuary personalty as distinct from the residuary real estate, with the result that it would have been necessary to resort partly to the real estate to satisfy the pecuniary legacies. It will be said that under the Administration of Estates Act, 1925, the order of administration is changed,

(1) [1941] Ch. 17.

with the result that the legacies are no longer a charge on real estate, but it is provided by s. 53, sub-s. 3 (*c*), of the Act that nothing therein shall alter the incidence of any death duties: see also sch. I., part II., para. 8 (*b*). To ascertain death duties, therefore, the estate must be notionally administered under the old law: see dictum of Clauson J. in *In re Thompson* (1).

Danckwerts and *Geoffrey Cross* for other parties interested in residue adopted the last argument.

Beebee for pecuniary legatees. Under the Administration of Estates Act, 1925, it is necessary to set aside a fund to meet pecuniary legacies out of the residue before paying testamentary expenses thereout. In doing so the residuary personalty must be exhausted first: see *In re Thompson* (1). It follows that the legacies are wholly payable out of personalty and do not bear any duty.

Heckscher for another pecuniary legatee.

UTHWATT J. The question which I have to decide is whether in the circumstances the pecuniary legatees are chargeable with any part of the estate duty leviable on the residuary real estate, which, for reasons which are technical but well known, is not a testamentary expense. It is conceded on behalf of the legatees that, if any part of their legacies are payable out of the real estate in due course of administration, then the proportion so payable must bear estate duty; but it is said that, under the provisions of the Administration of Estates Act, 1925, and the order of administration thereby directed, the whole of the pecuniary legacies ought in the circumstances of this estate to be paid out of personalty.

Sect. 34, sub-s. 3, of the Act is in these terms: "Where "the estate of a deceased person is solvent his real and personal "estate shall, subject to rules of court and the provisions "hereinafter contained as to charges on property of the "deceased, and to the provisions, if any, contained in his "will, be applicable towards the discharge of the funeral, "testamentary and administration expenses, debts and liabili-"ties payable thereout in the order mentioned in part II. of "the first schedule to this Act." This estate is a solvent estate. There are no provisions in the will which assist me on this point apart from the direction to appropriate a fund

(1) [1936] Ch. 676, 682, 683.

out of personalty. Nor are the provisions of s. 35 of the Act as to charges applicable. I turn accordingly to part II. of the first schedule. This part sets out the order of application of assets towards the estate liabilities in numbered paragraphs. Paragraph 1 deals with property undisposed of by will. Paragraph 2 is material and is as follows: "Property of the "deceased not specifically devised or bequeathed but included "(either by a specific or general description) in a residuary "gift, subject to the retention out of such property of a fund "sufficient to meet any pecuniary legacies, so far as not "provided for as aforesaid." In para. 5 there is mentioned "the fund, if any, retained to meet pecuniary legacies."

It follows that the first thing to be done in administering a solvent estate is to set aside out of residue a fund to satisfy the pecuniary legacies. That is the first charge, and it is a charge primarily on residuary personalty rather than on the residuary real estate: *In re Thompson* (1). The result is notionally to divide the residue into two separate funds, the first to meet pecuniary legacies (and for the purposes of this fund personal estate is the primary fund and only in so far as it is insufficient is there to be any resort to realty) and a second fund consisting of the balance of the residue, including residuary real estate. In meeting debts and testamentary expenses the second fund must be exhausted before the first is touched. It follows that in the present case the whole of the residuary personalty (other than the part thereof directed to be appropriated to meet the sums payable to the wife) is to be made available to satisfy the pecuniary legacies and estate duty will only be chargeable on such legacies if and so far as such personalty is insufficient to meet them, and they are satisfied out of real estate.

It is, however, urged on behalf of the residuary legatees that the matter is not quite so simple. It is rightly said that, under the method of administration current before the Act of 1925 came into force, the testamentary expenses would have been a first charge on the residuary personalty with the result that the pecuniary legacies would to a greater extent have been thrown on to the residuary real estate and would have borne a larger share of the estate duty. It is then contended that legacies which would have borne duty under the old law, must still bear an equal amount of duty under the new law, and in support of this argument my attention has

(1) [1936] Ch. 676.

been drawn to the following provisions of the Act. Sect. 53, sub-s. 3, provides: "Nothing in this Act shall—(*a*) alter any "death duty payable in respect of real estate or impose any "new duty thereon: (*b*) render any real estate liable to legacy "duty or exempt it from succession duty: (*c*) alter the "incidence of any death duties." Paragraph 8 (*b*) of Part II. of the first schedule further provides: "This part of this "schedule does not affect the liability of land to answer the "death duty imposed thereon in exoneration of other assets." In my view, these provisions are not intended to provide a guarantee that in no case will the new order of application of assets directed by the Act affect the incidence of death duties in a particular case as a matter of administration. The purpose of these provisions—and, no doubt, they are inserted ex majore cautela—is to preserve the general rules as to the incidence of death duties, such as the rule that the real estate bears its own estate duty. In this connexion I may, perhaps, refer to the judgment of Lord Greene M.R. in *In re Owers* (1). In applying these general rules to the facts, regard must be had to the new directions as to the order of administration of assets contained in the first schedule to the Act.

I arrive at this conclusion with all the more confidence since it is obvious that the practical results of a contrary decision would be most unfortunate. It would necessitate in many cases that the personal representatives should keep two separate sets of accounts in accordance with two different methods of administration, one for the purpose of ascertaining the incidence of death duties and the other for all other purposes. I should be slow to decide that the legislature intended anything so extravagant. I, accordingly, declare that the pecuniary legacies in the circumstances of this estate are only liable to bear a proportion of estate duty in so far as the residuary personalty, after deduction of the sums appropriated, but before deduction of any testamentary expenses, is insufficient to satisfy such legacies.

Solicitors: *E. Edwards & Son; C. V. Thornley, Town Clerk, East Ham; Pearce & Davis; Solicitor to the Treasury.*

H. L. L.

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(1) [1941] Ch. 17, 21.

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Feb. 16, 23.

In re WHITE'S MORTGAGE.

PUBLIC TRUSTEE *v.* WHITE.

Emergency legislation—Mortgage—Appointment of receiver—Appointment before September 3, 1939—*Death of receiver in* 1941—*Steps taken in August,* 1942, *to appoint new receiver—Exercise of remedy—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*ii.*).

Where a receiver appointed under a mortgage dies after September 3, 1939, a new person may be appointed in his place to keep the office continuous without the leave of the court under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, unless the interval between the death and the appointment is so great that the appointment is really that of a new receiver.

PROCEDURE summons.

On August 8, 1939, mortgagees, in exercise of a statutory power implied in their mortgage, appointed a receiver of the property therein comprised. On June 16, 1941, the receiver died. Steps with a view to continuing the receivership were not taken until August, 1942, following which a summons was issued under the Courts (Emergency Powers) Acts, asking for leave to appoint a receiver. On the hearing of the summons the question arose whether it was necessary to obtain the leave of the court under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, before appointing a person in the place of the deceased receiver (1).

J. A. Wolfe for the mortgagees.

UTHWATT J. I cannot find any help from the provisions of the Courts (Emergency Powers) Act, 1939, other than s. 1, sub-s. 2 (*a*) (ii.), in determining whether the appointment of a receiver made necessary by the death of a receiver who was appointed before the Act is the "exercise" of a "remedy which "is available . . . . by way of . . . . the appointment of a "receiver." In my view, where a receiver is replaced by another simply to maintain continuity and the efficacy of the "remedy" already "exercised," the leave of the court is not required for the new appointment, but where so long an interval has passed that this appointment is really a fresh transaction whereby a new receivership is created, leave is required. In the present case the original receiver died in June, 1941, and it was not until fourteen months later that steps were taken directed to the appointment of another receiver. The proper inference from those facts is that the appointment was a new transaction and not merely a continuance of the old transaction. Therefore, the leave of the court is required.

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(1) By s. 1, sub-s. 2: "Subject "to the provisions of this section, "a person shall not be entitled, "except with the leave of the "appropriate court,—(*a*) to proceed "to exercise any remedy which is "available to him by way of . . . . "(ii.) the appointment of a re"ceiver of any property . . . ."

Solicitor: *Harold E. Blaiberg.*

K. R. A. H.

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Mar. 15, 16, 17.

ERNEST TURNER ELECTRICAL INSTRUMENTS, LIMITED *v.* PERFORMING RIGHT SOCIETY, LIMITED.

PERFORMING RIGHT SOCIETY, LIMITED *v.* GILLETTE INDUSTRIES, LIMITED.

Copyright—Musical work—Broadcasting—Reception at factory—Performance " in public "—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2.

The proprietors of a factory, to prevent boredom on the part of their employees and thus to increase efficiency and output, relayed to their employees, who numbered about 600, while the latter were at work, programmes of music broadcast by the British Broadcasting Corporation and also gramophone records which were played at the factory and relayed by means of loud speakers. All strangers were excluded from the factory:—

Held; that the performance of the music was a performance " in public " within s. 1, sub-s. 2, of the Copyright Act, 1911.

Jennings v. *Stephens* [1936] Ch. 469 applied, and the view expressed by Greene L.J. in that case that, in deciding whether a performance was " in public," the relation of the audience to the owner of the copyright was a primary consideration, approved.

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Ernest Turner Electrical Instruments, Ld. v. Performing Right Society, Ld.
Performing Right Society, Ld. v. Gillette Industries, Ld.

Appeals from Bennett J.

Ernest Turner Electrical Instruments, Limited *v.* Performing Right Society, Limited.

The plaintiffs employed 500 to 600 persons at their factory. To prevent boredom on the part of their employees arising from abnormally long working hours and so to increase efficiency and output, the plaintiffs relayed to their employees, while the latter were at work, programmes of music broadcast by the British Broadcasting Corporation and also gramophone records played at the factory and relayed by means of amplifiers and loud speakers. The sole right to perform in public some of the musical works relayed belonged to the defendant society and, after correspondence between the plaintiffs and the society on the question whether the performance of those works by the plaintiffs constituted an infringement of copyright, the plaintiffs brought proceedings for a declaration that the performance at their factory of the music in question did not constitute an infringement of the society's copyright. By their defence, the society contended that the plaintiffs had shown no cause of action, and, by their counterclaim, they alleged that on August 14, 1942, the plaintiffs had performed in public four musical works (1), the sole right to perform which in public was vested in the society. The society, therefore, claimed an injunction to restrain the plaintiffs from infringing their copyright by performing or authorizing the performance in public of the specified works, or any other musical work of which the right of performance was in the society, without their consent. Bennett J. held that the performances were performances in public and dismissed the action. On the plaintiffs undertaking not to perform the four specified works in public without the consent of the defendant society, he made an order for an inquiry as to damages on the counterclaim.

Performing Right Society, Limited *v.* Gillette Industries, Limited.

The defendants, in the same circumstances as those of the previous case, broadcast to some 600 employees in their factory music of which the copyright was vested in the plaintiff society. The defendants excluded all strangers from their factory and every visitor was met and escorted to the person whom it was his business to see. The plaintiff society brought this action for an injunction restraining the defendants from infringing their copyright in the musical works in question by performing, or authorizing the performance of, them in public. Bennett J. held that the performances given by the defendants at their works were performed in public. The plaintiffs in the first case and the defendants in the second case, appealed.

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(1) By s. 1, sub-s. 2, of the Copyright Act, 1911, "For the "purposes of this Act 'copyright' "means the sole right . . . . to "perform . . . . the work or any "substantial part thereof in "public."

O'Sullivan K.C. and *Hewins* for the plaintiffs in the first case. Sections of the Copyright Act, 1911, dealing with performance in public are s. 2, sub-ss. 1, 2 (*c*), 3; s. 4; s. 11, sub-ss. 1, 2; s. 17, sub-ss. 1, 2; s. 35, sub-s. 2. Some of these provisions, such as the granting of compulsory licences under s. 4, or the imposing of criminal penalties under s. 11, clearly never contemplated performances, such as are here in question, being considered to be "in public." The words "performance in "public" or "performed in public" in the Copyright Act refer to the law as it was when the Act was passed, and not to such performances as those with which we are concerned here. These were not public performances. The public were excluded from the factory. The audience were united by their work, not by a desire to hear a performance. The performances were given in the employees' working hours as part of their working conditions, with a view to improving their output. No charge was made for the performances. In *Duck* v. *Bates* (1) the performance of a dramatic work before an audience of persons who were workers under the same roof was held not to be a performance in public. The present cases are stronger, because here the audiences were not gathered specifically to hear the music. In *Harms (Inc.) & Chappell & Co.* v. *Martans Club, Ld.* (2) the performance was one of the things for which the audience attended. In deciding whether a performance is "in public" within s. 1, sub-s. 2, of the Copyright Act, 1911, regard must be had to the fact that at the time the Act was passed broadcasting in public had not been introduced. It was the existing conditions then that were material: see *Duck* v. *Bates* (3). No doubt, a statute must be extended to include conditions which did not exist when it

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(1) (1884) 13 Q. B. D. 843, 848, 852.

(2) [1926] Ch. 870; C. A. [1927] 1 Ch. 526.

(3) 13 Q. B. D. 843, 849, 851.

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was passed, but s. 1, sub-s. 2, cannot be taken to cover the circumstances of the present cases. When the Act was passed, performances "in public" referred to performances given for the enjoyment of the public at places of entertainment. That underlying conception is foreign to anything here. The test is the quality of the audience: see *Performing Right Society, Ld.* v. *Hawthorns Hotel* (*Bournemouth*), *Ld.* (1) and *Jennings* v. *Stephens* (2). It was not until 1934 that it was decided that a person who switched on the wireless was having a performance: *Performing Right Society, Ld.* v. *Hammond's Bradford Brewery Co.* (3). There must have been an invitation of the public to the performance for it to be a performance "in public." [They also referred to *Caird* v. *Sime* (4).]

Roxburgh K.C. and *Marlow* for Gillette Industries, Ld. The court has to decide in each case whether on the particular facts the performance is or is not "in public." In deciding that, regard must be had to the character of the audience: See per Lord Wright M.R. and Romer L.J. in *Jennings* v. *Stephens* (5). Greene L.J., in his judgment, expressed the view that it was the character of the audience in relation to the owner of the copyright, and not in relation to the performer, that was material, but the owner of the copyright might only be the mortgagor or transferee of the author. It is contended that the audience must be considered in relation to the performer. It has never been laid down that a performance is in public unless it is domestic or quasi-domestic. It is not suggested that this case is governed by *Duck* v. *Bates* (6), but that case possesses the features that part of the audience of a performance at a hospital were doctors who did not reside in the hospital: see also *Harms* (*Inc.*) *& Chappell & Co.* v. *Martans Club, Ld.* (7). There are five items which support the view that here the performances were not in public: (1.) Each performance is by the management to its staff; (2.) it takes place in their common place of business; (3.) it is given during business hours in the course of the staff's employment; (4.) it is given as an amenity to improve the conditions of labour; and (5.) there are no visitors. The circumstance of paramount importance is that

(1) [1935] 1 Ch. 255.
(2) [1936] Ch. 469.
(3) [1934] Ch. 121.
(4) [1887] 12 App. Cas. 326.
(5) [1936] Ch. 469, 485.
(6) 13 Q. B. D. 843.
(7) [1927] 1 Ch. 526.

the audience is made up entirely of members of a community organized for purposes of work and not for entertainment of any description. The size of the audience is a material consideration and the facts in regard to each factory must be considered separately.

Harman K.C., *Shelley K.C.* and *Skone-James* for the society were not called on.

Lord Greene M.R. In all material respects the facts in these two appeals are the same. So far as it may be relevant to consider whether or not an employer who gives such a performance as those in the present cases is doing so for his own profit, the view taken by Bennett J. appears to be unquestionably right. It is in the interest of every employer to keep his workpeople happy and contented and to see that the quality of their work is not impaired by feelings of boredom. It is true that, at any rate, in the *Ernest Turner* case, there seems to have been a difference of opinion on the board whether or not these performances assisted in that respect, but the object of giving the performances was to improve production or to prevent its decline. It is not of the slightest importance for present purposes that the increase of output was in the national interest. The owner of the copyright is entitled to be paid for the use of his property unless and until the legislature otherwise determines, and he is entitled to be paid for it even if its use concerns the public welfare.

We have been referred to a number of authorities, but I propose to base my judgment on the latest authority in this court where the previous cases were considered and reviewed. That authority is *Jennings* v. *Stephens* (1), and I refer to two short sentences in the judgments of Lord Wright M.R. and Romer L.J. Lord Wright said (2): "The true criterion seems "to be the character of the audience," and Romer L.J. said (3): "The question whether an entertainment is given "in public or in private depends, in my opinion, solely upon "the character of the audience." That, of course, does not mean that any element is to be excluded from consideration which throws light on the matter. In the present case the nature of the audience puts the matter beyond doubt. In each case the audience constituted a substantial part of the working population of the district, collected from different

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(1) [1936] Ch. 469.

(2) Ibid. 479.

(3) Ibid. 482.

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households in the district. It was an audience which obviously was fond of music. In one case the practice of performing music was initiated at the request of the workpeople themselves, and from time to time groups of workpeople or individual workmen asked for a particular song. Clearly, therefore, the whole object of these performances is to supply to the workpeople something which they like.

So far as regards the music, the workpeople are an audience. The fact that it assists their work appears to be entirely irrelevant. While the performances are being given, the workpeople are doing two things at once. They are working and they are enjoying music as they would normally enjoy it in their leisure hours. They are, so far as the music is concerned, an audience listening to music, and the fact that they are working at the same time does not alter that. The position is like that of a housewife who listens to the music on her receiving set while she is doing her work. The matter can be tested by considering what the position would be if the proprietors of these businesses decided, with a view to keeping their workpeople in good heart and temper, from time to time to give them broadcast performances or gramophone performances after their work was over. The object would be the same, and the result in substance would presumably be the same. It would seem that precisely the same principles are applicable in the present case as if these concerts were given in the factory to the workpeople after they had laid down their tools.

When those considerations are borne in mind, the answer to the present question appears to me to be beyond doubt. It is a question of law whether these performances are performances "in public" within the language of the statute, but, in answering that question of law, the chief guide to the court is the guide of common sense. Some cases on their facts fall on one side of the line, and some on the other. In the present case, having regard to the character of the audience and all the relevant facts which bear on the matter, I have no doubt that these performances were performances "in "public." In *Jennings* v. *Stephens* (1) I ventured to suggest that the primary matter to consider was the relationship of the audience to the owner of the copyright rather than the relationship of the audience to the performers. I am confirmed in that view by a consideration of the present cases. When the legislature, by the Copyright Act, conferred on the owner of copyright a monopoly, it, no doubt, intended that that monopoly should be a real, and not an illusory, right of, property, and it is, therefore, in my opinion, important to consider whether a particular performance is calculated to whittle down that monopoly to any substantial extent. To take a case at one end of the scale, a purely domestic performance, or what is sometimes called a quasi-domestic performance, is not calculated to whittle down the value of the monopoly. It cannot have the substantial effect of depriving the owner of the copyright of the public from whom he receives the value of the work of his brain and his imagination. At the other end of the scale is a performance unquestionably in public, such as one at a public theatre or a public concert hall. Obviously, if that were permitted, it would whittle down the value of the monopoly. The monopoly is confined to performances in public, and, in considering whether a performance is in public, its effect on the value to the copyright owner of his statutory monopoly is, I venture to think, a consideration of great importance. I say that in further explanation of the observations which I made in *Jennings* v. *Stephens* (1).

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(1) [1936] Ch. 485.

In the *Gillette* case, Mr. Roxburgh criticized the view which I had expressed and invited us to pay regard, not to any relation of the audience to the owner of the copyright, but to the relation of the audience to the performer. In each of the present cases the performer is the proprietor of the factory. Whatever may be the value of a consideration of the relation of the performer to the audience in other cases, it seems to me that in the present case it affords an entirely misleading guide. It could make no difference, in my opinion, if in the present case the performances had been given, not by diffusion through the factory by means of loudspeakers operated by the management, but by a neighbour who set up a system of diffusion by loudspeakers which could be heard through the factory. The difference in the relationship of the performer and the audience could not, it seems to me, affect the question whether or not the performance was "in public." Mr. Roxburgh said that the parties in each of these cases were all members of a community organized for work. It seems impossible to regard everything that takes place inside the factory with regard to this music as a purely domestic concern of those taking part in it, whether as performer or audience. The test he suggests seems to me to break down in these cases, whereas the test which I venture to suggest would, in a great many cases, and certainly in the present cases, be most helpful. The relation of the audience to the copyright owner and the effect which the performance has on his monopoly is a consideration which seems to me to throw a good deal of light on the situation.

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(1) [1936] Ch. 469, 485.

It was said that it was not legitimate to consider what the effect would be of a decision in favour of the employers in the present cases, having regard to the fact that there are thousands of factories in the country, employing, no doubt, hundreds of thousands, indeed millions, of workpeople. If performances can be given without infringement of copyright in these two cases, they can be given in every case. To discover the real nature of the audience and the effect on the monopoly of treating these performances as private performances, it seems to me to be relevant to consider what the result would be if performances of this kind were given in all the other factories in the country. The result would be that the employers of millions of workpeople would be giving to those workpeople without payment the fruit of the brains, skill, imagination, and taste of various authors and composers, or the property of their successors in title, without any remuneration to him or them, and would be getting the advantage of that work, taste and skill, in obtaining increased or improved output. The effect would be largely to destroy the value of the statutory monopoly by depriving the owners of copyright of the exclusive right to sell their goods to the public. I think it is legitimate to take those matters into consideration, not to turn a rightful act into a wrongful act in these two cases, but to see what in each case is the nature of the audience that is having the benefit of the music. Looking at the matter in that way confirms me in my view that the audience, in the case of each factory, must be regarded as a section of the public. The legitimacy of taking these matters into consideration is clearly recognized by Lord Wright in his judgment in *Jennings* v. *Stephens* (1) when he says, in reference to the case before him: "If that were not a performance in "public, and might be repeated indefinitely all over the "country, the performing right would not be of much value." There Lord Wright was regarding the question from much the same angle as I am. He is taking into account the

(1) [1936] Ch. 469, 480.

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extent to which the value of the statutory monopoly would be whittled down as a material factor in dealing with these questions. In my opinion, the learned judge came to the only possible conclusion in these cases and the appeals must be dismissed, with costs.

LUXMOORE L.J. I agree that both appeals must fail and that there is no ground for any material distinction between the facts in the two cases. Bennett J., in his judgment in the *Gillette Industries* case, said: "I find it impossible to discover "any real distinction between the present case and *Jennings* "v. *Stephens* (1) and, as I say, without attempting to define "what is meant by 'in public,' regarding the case as one in "which the antithesis to 'in public' is 'in private,' I have "come to the clear conclusion on the facts that these "defendants, when every day they broadcast these half-hourly "performances of 'Music while you work,' are giving per-"formances in public, and that any item of music included "in the programme is, therefore, being performed in public." I find myself in agreement with what the learned judge said, whether the cases be viewed from the angle of Lord Wright M.R. and Romer L.J. in *Jennings* v. *Stephens* (1), or from that of my Lord in the same case, although, speaking for myself, I find the latter point of view the more satisfying. Indeed, I think that Lord Wright himself was really inclined to the same view when he said, in the passage which my Lord has just read, that if the performance in *Jennings* v. *Stephens* (1) were not a performance in public and might be repeated indefinitely all over the country, the performing right would not be of much value. It certainly seems to me that those words are equally applicable to the present cases when one realizes the number of factories there are in the country at the present time and their size. I have no doubt that both these appeals should fail.

GODDARD L.J. I agree. I can think of no more satisfactory test of what is a performance "in public" for the purpose of the Copyright Act than that suggested by my Lord in *Jennings* v. *Stephens* (1). In that case Lord Wright M.R. said that the criterion was the character of the audience, and the passage in my Lord's judgment to which I have referred supplies a good test of that character. Is the audience one which the owner of the copyright could fairly consider a part of his public? If it be objected that guests in a private house would be a part of that public, the answer I think is that, in selling a piece of music or a gramophone record, the owner of the copyright contemplates that it will be played, and consents to its being played, by the purchaser and he expects, not that it will be enjoyed in solitude, but that it will be heard by members of the purchaser's household and his guests. If an action for damages or penalties were tried by a jury, and this direction were given to them, they could without difficulty and by a mere application of their common sense decide whether the audience in any particular case exceeded what could fairly be described as a private or domestic audience. Exactly the same considerations apply to broadcasting. The principal object of the Act is to safeguard the property of authors or their transferees in their copyright, and, if employers of labour were entitled to cause compositions to be performed before their employees without any expense beyond buying a piece of music or a record or paying for a licence for a wireless receiving set, an author would very soon have his public seriously diminished and the protection of the Act would be largely illusory. I agree that in each of these cases the performance was in public, and that the appeals should be dismissed.

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(1) [1936] Ch. 469.

Appeals dismissed.

Solicitors: *C. Grobel, Son & Co.; Bell, Brodrick & Gray; Syrett & Sons.*

H. C. G.

In re BARON.

Ex parte THE DEBTOR *v.* THE OFFICIAL RECEIVER.

MORTON
AND
UTHWATT
JJ.

1943
Apr. 5.

Bankruptcy—Adjudication—Appeal—Right of creditor to be heard—"Person aggrieved"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), s. 108, *sub-s.* 2.

When creditors, under s. 18, sub-s. 1, of the Bankruptcy Act, 1914, have resolved that the debtor be adjudged bankrupt the matter passes out of their hands, and they cannot intervene in any legal proceedings which may follow as a result of that decision. A creditor, therefore, has no right to appear and be heard as a "person aggrieved" within s. 108, sub-s. 2, of the Act, on an appeal by the debtor against an adjudication order made against him under s. 18, sub-s. 1, at the instance of the official receiver.

APPEAL from Rochdale county court.

A petition in bankruptcy having been filed and a receiving order having been made against the debtor in 1942, the first meeting of creditors was held on January 1, 1943, it being adjourned to February 24, 1943, when a resolution was passed by a majority that the debtor should be adjudicated bankrupt. On March 1, 1943, the official receiver applied to the county court for an adjudication order which was made. The debtor appealed against the order. The notice of appeal was served on the petitioning creditors as respondents to the appeal.

The debtor in person.

N. H. Lever for creditors opposed to the adjudication, submitted that in the special circumstances of the case he ought to be heard. A majority of unsecured creditors were opposed to adjudication, and desired to present their view, without claiming any right to be heard.

Gallop for the petitioning creditors. If the order for adjudication had been refused in the county court a petitioning creditor would have been entitled to appeal as a "person "aggrieved" under s. 108, sub-s. 2, of the Bankruptcy Act, 1914 (1). It must follow that a petitioning creditor is entitled, in a proceeding, such as the present appeal, in which it is sought to discharge an adjudication order, to be heard as a respondent to maintain the order. Moreover, the petitioning creditors have been served by the debtor with notice of this appeal, and they are, therefore, entitled to appear and be paid their costs. [*Ex parte Mason* (1) was referred to.]

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(1) By Bankruptcy Act, 1914, s. 108, sub-s. 2: "Orders in "bankruptcy matters shall, at "the instance of any person "aggrieved, be subject to appeal ". . . ."

Aronson for the official receiver. A "person aggrieved" means a person whose legal rights have been infringed (*Ex parte Sidebotham* (2)), and no legal right of the petitioning creditors has been infringed. If a person has no right to appear on an appeal such as this, the debtor cannot clothe him with such a right by serving notice of appeal on him. A creditor, as such, has no right to appear. Section 18, sub-s. 1, of the Bankruptcy Act, 1914, provides that when the majority of creditors vote for adjudication, the court shall make the order. It would stultify that sub-section if individual creditors could persuade the court not to act in accordance with the decision of the majority: *In re Pinfold* (3); *In re Thurlow (Lord)* (4).

MORTON J. (having stated the facts and referred to the Bankruptcy Act, 1914, ss. 18 and 167 and the Bankruptcy Rules, 1914, rr. 5, 7 and 14). Let me deal, first, with one point in order to dispose of it. Mr. Gallop's clients were made respondents to the appeal in the notice of appeal which the debtor issued, but all the counsel who addressed us agreed that that cannot affect the question which we have to decide. The debtor cannot, by taking this action, make the petitioning creditors proper respondents and entitle them to address the court if they are not, in fact, proper respondents.

With regard to the main contention which has been urged before us, I would refer to *In re Pinfold* (5), where the question was whether the county court judge had a discretion to refuse to adjudicate the debtor bankrupt and Vaughan Williams J. said: "The scheme of the Bankruptcy Act seems to be this: "where the court has come to the conclusion that the case is "a proper one for an adjudication, it is to make a receiving "order in the first instance instead of an adjudication, in order "that the creditors may have an opportunity of deciding "whether they wish for an adjudication or not, but the "opportunities which they are given for that purpose are

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(1) (1880) 14 Ch. D. 71.

(2) Ibid. 458.

(3) [1892] 1 Q. B. 73.

(4) [1895] 1 Q. B. 724.

(5) [1892] 1 Q. B. 73, 75.

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"limited to those mentioned in s. 20 [of the Bankruptcy Act, "1883 which was re-enacted by s. 18, sub-s. 1, of the Act of "1914]; and if they do not avail themselves of them, then an "adjudication is to follow as a matter of course. In my "opinion the court has no discretion to give the creditors "any further opportunity of considering their position beyond "those mentioned in s. 20; it has no discretion to refuse to "make the order merely for purposes of delay." The scheme of the Bankruptcy Act, 1914, would seem to be that when creditors have resolved that the debtor be adjudged bankrupt the matter passes out of their hands. The general body having made its decision, it is not for any individual creditor to intervene in proceedings which may follow as a result of that decision. It seems to me that it would be not only productive of grave inconvenience if individual creditors could demand to be heard in an appeal of this kind, but that it would also be contrary to the scheme which the legislature has laid down.

It was submitted that every creditor who did not wish the adjudication order to be made is a "person aggrieved," within s. 108, sub-s. 2, of the Act. I do not take that view. Such a creditor might be a person who was disappointed, but he is not a "person aggrieved," within the definition given by James L.J. in *Ex parte Sidebotham* (1) when he said: "But "the words 'person aggrieved' do not really mean a man "who is disappointed of a benefit which he might have received "if some other order had been made. A 'person aggrieved' "must be a man who has suffered a legal grievance, a man "against whom a decision has been pronounced which has "wrongfully deprived him of something or wrongfully refused "him something or wrongfully affected his title to something." I cannot see that either the petitioning creditors, or any of the other creditors in the present case, answer that description.

I need not consider the question whether or not any individual creditor could have applied for the adjudication. In fact, the official receiver applied, and I cannot see that any person other than the official receiver and the debtor is a proper party to this appeal. It is true that, if the court is satisfied in any case that exceptional circumstances exist which render it desirable in the interests of justice that a person who is not a party should be heard, the court may require that person to be brought before the court before deciding the

(1) (1880) 14 Ch. D. 458, 465.

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matter. In the present case I cannot see that the interests of justice require that either the petitioning creditors or any other creditor should be brought before the court, and, in my view, neither the petitioning creditors nor any other creditor has the right to be heard by the court at the hearing of this appeal.

UTHWATT J. I agree. I see no reason why we require the assistance of counsel for the petitioning creditors or other creditors on the hearing of this appeal. They are not necessary nor proper parties.

Solicitors: *Asher & Banbridge, Manchester; Woolfe & Woolfe; Solicitor, Board of Trade.*

H. L. L.

UTHWATT J.
1943
Apr. 16.

IRVING *v.* PATTERSON.

Emergency legislation — Agriculture — Agricultural holding — Contract of sale after September 3, 1939—*Notice to tenant to quit after end of* 1941—*Consent of Minister of Agriculture—Need to act judicially as between landlord and tenant—Defence* (*General*) *Regulations*, 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 62 (4A).

The Minister of Agriculture and Fisheries, in deciding whether to consent in writing, under reg. 62 (4A) of the Defence (General) Regulations, 1939, to a notice to quit given to a tenant of an agricultural holding which is subject to a contract of sale made since September 3, 1939, or has been sold since then, is not under a duty to act judicially as between the tenant and the landlord. The tenant, therefore, is not entitled to be heard at an inquiry held to determine whether or not the minister should give his consent, nor to have the fact of that consent, if given, communicated to him.

MOTION.

On January 19, 1942, the owners of agricultural holdings then occupied by the plaintiff agreed to sell them to the defendant. On January 30, 1942, the owners gave the plaintiff notice to quit on February 2, 1943, and on April 30, 1942, the sale was completed. The Minister of Agriculture and Fisheries, before consenting "in writing" to the giving of the notice to quit, within the meaning of the proviso to reg. 62 (4A) of the Defence (General) Regulations, 1939 (1), caused an inquiry to be conducted by the local agricultural executive committee. The plaintiff was not given an opportunity of being heard by the committee. On November 12, 1942, the minister consented in writing to the notice. That consent was communicated to the owners, but it was in dispute whether a copy of it was received by the plaintiff, as the minister suggested that it was. On this motion the plaintiff asked for a declaration that the notice to quit was null and void, damages for trespass, and an injunction restraining the defendant, his servants and agents, from depasturing cattle on the land, or otherwise trespassing on it or interfering with the use and possession of it by the plaintiff.

Done for the plaintiff. The notice to quit given to the plaintiff is null and void. True, that the minister purported to consent to it, and so give it validity, but his consent was also null and void since, in considering whether he should give it, he failed to act judicially as he was bound to do. The object of the minister's jurisdiction is to safeguard the public interest by preventing speculation in agricultural land, and his decision affects the rights of subjects who have conflicting interests, namely, the landlord and the tenant of the land affected. He must, therefore, reach his decision judicially and in accordance with the principles of natural justice: see *Rex* v. *Hendon Rural District Council* (2), where Lord Hewart C.J. referred to the judgment in *Rex* v. *Electricity Commissioners* (3) of Atkin L.J., who said: "Wherever "any body of persons having legal authority to determine "questions affecting the rights of subjects, and having the "duty to act judicially, act in excess of their legal authority "they are subject to the controlling jurisdiction of the King's "Bench Division exercised in these writs [of certiorari]": see also *Reg.* (*Wexford County Council*) v. *Local Government*

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(1) Reg. 62 (4A): "Where the "whole or any part of an agricultural holding is subject to a "contract of sale made since "September 3, 1939, or has been "sold in pursuance of a contract "of sale made since that date, "any notice to quit that holding "or any part thereof given to the "tenant so as to expire at any "time after the end of the year "1941 shall be null and void: "Provided that this paragraph "shall not apply to any notice if "(whether before or after the "giving thereof) the Minister of "Agriculture and Fisheries con-"sents in writing thereto."

(2) [1933] 2 K. B. 696, 702.

(3) [1924] 1 K. B. 171, 205.

Board (1), where Palles C.B. stated the principle as follows: "I have always thought that to erect a tribunal into a 'court' "or 'jurisdiction,' so as to make its determination judicial, "the essential element is that it should have power, by its "determination within jurisdiction, to impose liabilities or "affect rights." The delegating by the minister to the local agricultural committee of the duty to hold the inquiry was a delegation of part of his power, but he still remained the authority who had to make the investigation and give the consent. The committee, who were the agents of the minister, never informed the plaintiff of the inquiry which they held, and never gave him an opportunity either of answering statements made to the committee by other persons or of himself making representations to the minister. In *Cooper* v. *Wandsworth Board of Works*, Willes J. said (2): "I apprehend that a tribunal which is by law invested with "power to affect the property of one of Her Majesty's subjects, "is bound to give such subject an opportunity of being heard "before it proceeds: and that that rule is of universal "application, and founded upon the plainest principles of "justice." Moreover, the minister has to determine the rights of the parties who cannot know what those rights are until he tells them. Therefore, the words "consents in "writing" must imply a written communication of the consent by the minister to both parties. Here, the consent was not communicated to the plaintiff. It cannot have been intended that a tenant should be kept in complete ignorance, up to the very last minute of his tenancy, whether that tenancy is coming to an end or not.

Raymond Jennings, for the defendant, was not called on to argue.

UTHWATT J. The plaintiff, to succeed on this motion, must show that it is the duty of the minister, when considering whether or not he shall give his consent to a notice to quit under the proviso to reg. 62 (4A), to act judicially as between a tenant and his landlord. If the minister has a duty to act judicially under the regulation, he clearly has not done so in the present case, but the question arises whether his jurisdiction with regard to this matter is judicial or administrative.

The whole object of the regulation, on the face of it, would appear to be that the minister shall consider whether he shall give his consent, not from the point of view of the tenant, but in the light of the circumstances of the transaction. He will, no doubt, consider whether the purchaser is to have the same rights as the vendor would have had if there had not been a sale. Under the regulation, he need not take into account the position of the tenant. I am far from saying that in this connexion the minister is bound to act judicially at all. It is necessary to say only that, in my view, the minister is not bound to act judicially as between the tenant and the landlord. The plaintiff's first objection to the notice, therefore, fails.

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(1) (1902) 2 Ir. R. 349, 373.

(2) (1863) 14 C. B. (N. S.) 180, 190.

I need not consider the second objection, namely, that a copy of the consent was not given, nor was the fact of it notified, to the plaintiff, because, as I have stated, the minister has no duty whatever to the tenant in any circumstances. The motion, therefore, fails.

Solicitors for the plaintiff: *Speechly, Mumford & Craig, for Saul & Lightfoot, Carlisle.*

Solicitors for the defendant: *Kinch & Richardson, for Bendle, Sibson & Davidson, Carlisle.*

K. R. A. H.

TITHE REDEMPTION COMMISSION *v.* COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES.

C. A.
1943
Mar. 9, 10; *Apr.* 10.

Ecclesiastical law—Church in Wales—Tithe rentcharge—Vesting in Commissioners of Church Temporalities in Wales—Former vesting in Ecclesiastical Commissioners for England—"Lay impropriator"—Liability to repair chancels—Welsh Church Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *s.* 28, *sub-s.* 1.

On the disestablishment of the Welsh Church certain tithe rentcharges, formerly vested in the Ecclesiastical Commissioners for England, became vested in the Commissioners of Church Temporalities in Wales, being ultimately transferable by them to the University of Wales by virtue of the provisions of the Welsh Church Acts, 1914 and 1919. A summons was taken out by the Tithe Redemption Commission to determine whether these tithe rentcharges were, immediately before October 2, 1936 (the date under the Tithe Act, 1936, for the extinguishment of tithe rent charge), vested in the Welsh Commissioners subject to or freed

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Tithe Redemption Commission v. Commissioners of Church Temporalities in Wales.

from the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in the Welsh Commissioners :—

Held, by the Court of Appeal, that, although the Ecclesiastical Commissioners might, for general purposes, be regarded as lay impropriators of tithe rentcharge, they were not lay impropriators within s. 28, sub-s. 1, of the Welsh Church Act, 1914, which preserved the liabilities of lay impropriators in respect of repairs to ecclesiastical buildings, since their inclusion in that phrase would be inconsistent with the extinction by s. 6 of their powers and liabilities to make payments for any ecclesiastical purpose connected with the Church in Wales, and, therefore, as from the date of disestablishment, neither they nor the Welsh Commissioners as their statutory transferees were under the liability to repair chancels.

Decision of Bennett J., p. 18 ante, affirmed.

APPEAL from Bennett J.

At the date of the disestablishment of the Welsh Church certain tithe rentcharges (forming part of the Welsh ecclesiastical property and formerly vested in the Ecclesiastical Commissioners for England), which were not appropriated to the use of any parochial benefices, became vested in the Commissioners of Church Temporalities in Wales (the Welsh Commissioners) by the combined operation of the Welsh Church Acts, 1914 and 1919, and orders made thereunder. These tithe rentcharges would, if the Tithe Act, 1936, had not been passed, have been transferable to the University of Wales under s. 8, sub-s. 1 (*e*), of the Welsh Church Act, 1914. A summons was taken out by the Tithe Redemption Commission—the defendants being the Welsh Commissioners, the Representative Body of the Church in Wales, Plymouth Estates, Ld. (who, at the date of the coming into operation of the Welsh Church Acts, owned a portion of tithe in the parish of Llantwit Major, the balance being vested in the Ecclesiastical Commissioners), and the University of Wales—to determine whether the tithe rentcharges became under the said Acts and were immediately before October 2, 1936 (the date under the Tithe Act, 1936, for the extinguishment of tithe rentcharge), vested in the Welsh Commissioners subject to the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in the Welsh Commissioners, or were freed from that liability. That depended on whether the Ecclesiastical Commissioners were "lay impropriators" within the meaning of s. 28, sub-s. 1, of the Welsh Church Act, 1914 (1). If so, they, and the Welsh Commissioners, as their statutory transferees, were liable for repairs of ecclesiastical buildings. If not, neither was liable. Bennett J. held that neither the Ecclesiastical Commissioners for England nor their statutory transferees, the Welsh Commissioners, were lay impropriators within s. 28, sub-s. 1, of the Welsh Church Act, 1914, and that, therefore, the tithe rentcharges were, immediately before October, 1936, vested in the Welsh Commissioners freed from the liability to repair. The Representative Body of the Church in Wales, and Plymouth Estates, Ld. appealed.

Roxburgh K.C., *W. G. Hannah* and *Gwyn Rees* for the Representative Body of the Church in Wales. The rentcharges transferred from the Ecclesiastical Commissioners to the Welsh Commissioners vested in them subject to the obligation to repair chancels to which they had previously been subject. In the present case, if the Welsh Commissioners were freed from liability, the whole liability would fall on Plymouth Estates, Ld., who were owners of only a small part of the tithe rentcharge, although it has been recognized by the Court of Appeal that where there are two titheowners each has a right of contribution against the other: *Wickhambrook Parochial Church Council* v. *Croxford* (2). In deciding that the Welsh Commissioners took free of the liability to repair, Bennett J. relied on a single passage in the judgment of MacKinnon L.J. in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (3), although Lord Greene M.R., in dealing with tithe rentcharge in spiritual ownership before the date of disestablishment, was careful not to decide anything as to tithe rentcharge in the hands of lay impropriators before that date. The

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(1) By Welsh Church Act, 1914, s. 28, sub-s. 1: "Nothing in this "Act shall affect any liability to "pay tithe rentcharge, or the "liability of any lay impropriator "of any tithe rentcharge to repair "any ecclesiastical building, but a "county council shall not, by "reason of being entitled to or "receiving any tithe rentcharge "under this Act, be liable for the "repair of any ecclesiastical "building."

Sub-s. 2: "Such liability as "aforesaid of a lay impropriator "may be enforced in the temporal "courts at the instance of the "representative body in like manner as if such liability arose "under a covenant made with "the representative body and "running with the tithe rentcharge."

(2) [1935] 2 K. B. 417.

(3) [1940] Ch. 607, 627.

Ecclesiastical Commissioners were lay impropriators, and, therefore, by virtue of s. 28, sub-s. 1, of the Act of 1914, nothing in the Act affects their liability to repair chancels. The result is that the Welsh Commissioners, as their statutory assignees under s. 4, sub-s. 1 (*a*), and s. 5, are made subject to the same liability by s. 28. By "lay impropriator" is meant any owner of rectorial property who is not an ecclesiastical or spiritual owner. The test is the nature of the owner, not the purposes for which the property is applied. The Ecclesiastical Commissioners are, therefore, lay impropriators, and it matters not whether in their hands the common fund is applied for spiritual purposes or not. The liability to repair can be enforced against anyone holding a part of the rectorial property, but he has a right of contribution from other owners of rectorial property. Sect. 28 of the Welsh Church Act, 1914, leaves the liability, and the right to contribution untouched in the case of lay impropriators. [LORD GREENE M.R. Is not s. 28 applicable only to persons who continued to be lay impropriators after the date of disestablishment ?] No. That is contrary to what was said in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (1). The assignee of a lay impropriator, whether by purchase or by statute, continues liable for repairs, because by sub-s. 2 of s. 28 the liability is to be treated as a covenant made by the lay impropriator which runs with the land. Thus, the Welsh Commissioners take subject to the liability to which the Ecclesiastical Commissioners were liable in respect of any tithe rentcharge or part thereof transferred to them. There is no provision to relieve the Welsh Commissioners or the University of Wales as there is in the case of county councils. Although the relevant matters happen uno ictu on the date of disestablishment, they must be treated as happening in their appropriate order, namely, (1.) the Ecclesiastical Commissioners enter into the notional covenant with the Representative Body under s. 28, sub-s. 2 ; (2.) ecclesiastical law ceases to operate in Wales ; (3.) the liability of the Ecclesiastical Commissioners is transferred to the Welsh Commissioners. Those things must be conceived as happening successively, for otherwise there would be a gap, however short, between the cessation of ecclesiastical law and the entering into the covenant wherein there would be no means of enforcing the liability.

Wilfrid Hunt for Plymouth Estates, Ld., adopted the argument

(1) [1940] Ch. 607, 627.

for the Representative Body. The court should lean against a construction of the Act which imposed extra burdens on persons like his clients without providing for compensation.

Rewcastle K.C. and *Beebee* for the Welsh Commissioners. The material question is not whether the Ecclesiastical Commissioners are lay impropriators, but whether they are lay impropriators within the meaning of s. 28, sub-s. 1, of the Welsh Church Act, 1914. That provision as to lay impropriators was necessary because otherwise they would have been relieved of their liability to repair chancels by the abolition of ecclesiastical law in Wales under s. 3. That no one intended in the case of lay impropriators in the position of Plymouth Estates, Ld., and they were, therefore, taken out of the Act. Their liability was continued, but the method of enforcing it was altered. Quite different considerations apply to bodies like the Ecclesiastical Commissioners. There are several reasons against construing s. 28 as applying to the Ecclesiastical Commissioners: (1.) Words in a statute must be given their natural and ordinary meaning; (2.) the words of s. 28 are only appropriate to a continuing lay impropriator; (3.) the Ecclesiastical Commissioners differ substantially from ordinary lay impropriators by reason of the purposes for which their common fund is applicable; (4.) the object of s. 28 is to make the Act inapplicable to lay impropriators, but the Act applies to the Ecclesiastical Commissioners in that it expressly takes property away from them, with the result that they cease to be lay impropriators of that property; (5.) it would be curious if Parliament were to say as to one class of lay impropriators, namely, the county councils, that they shall be excluded from liability, and at the same time, for no obvious reason, to leave the Welsh Commissioners, and through them the University of Wales, under the very liability of which they had relieved the county councils.

Beebee for the University of Wales.

Waite for the plaintiffs.

Roxburgh K.C. and *Hunt* replied.

Cur. adv. vult.

Apr. 20. The following judgments were read:

LORD GREENE M.R. Under the provisions of the Welsh Church Acts, 1914 and 1919, tithe rentcharge owned by the Ecclesiastical Commissioners which was ascertained to be Welsh Ecclesiastical property, but was not appropriated to the use of any parochial benefice, vested as from the date of disestablishment (that is to say, March 31, 1920) in the Commissioners of Church Temporalities in Wales (hereinafter referred to as "the Welsh Commissioners"). Under s. 8, sub-s. 1 (*e*), of the Welsh Church Act, 1914, the ultimate destination of this tithe rentcharge was to be the University of Wales. Part of the tithe rentcharge with which we are concerned in this appeal was of this character, the remainder was tithe rentcharge in lay hands forming no part of the endowments of the Church in Wales. Before any transfer to the University of Wales took place, the Tithe Act, 1936, came into force. Under that Act all tithe rentcharge was extinguished on October 2, 1936, with compensation to the owners in the form of redemption stock. Under s. 31 of that Act provision is made for the liability to repair the chancel of a parish church which arises from the ownership of tithe rentcharge payable in respect of land in the parish. To provide for that liability, part of the redemption stock, calculated to be sufficient to provide for future repairs, is to be issued to the diocesan authority, which in Wales is the Representative Body of the Church in Wales. Under the seventh schedule to the Act, where the obligation to repair a chancel attaches to the ownership of two or more rentcharges, the stock so to be issued to the diocesan authority is to be taken proportionately from the redemption stock issuable in respect of those rentcharges, the owner of each rentcharge being treated as liable for no more than his due proportion of the cost of the repairs.

The present question arises in the following way. If, notwithstanding the disendowment of the Church in Wales, liability to repair chancels remained attached to the ownership of the tithe rentcharge which under the Welsh Church Acts is to be transferred from the Ecclesiastical Commissioners to the Welsh Commissioners and by them to the University of Wales, part of the redemption stock which falls to be issued to the University of Wales as the ultimate transferees will be issuable to the Representative Body to meet the cost of future repairs. If, on the other hand, the liability to repair was extinguished on disendowment, the University of Wales will be entitled to the whole of the redemption stock. There is a further complication. In certain cases some of the rentcharges payable in respect of lands in a parish were in lay hands, and their ownership was not affected by the Welsh Church Acts.

Thus, in the case of the parish of Llantwit Major, in Glamorganshire, tithe rentcharges amounting to 481*l.* 7*s.* 11*d.* belonged to the Ecclesiastical Commissioners, while tithe rentcharges amounting on October 2, 1936, to 64*l.* 4*s.* 2*d.* belonged to Plymouth Estates, Ld., whose title is not affected by the Welsh Church Acts. If, therefore, the liability in respect of repairs to the chancel of the parish church which formerly attached to the ownership of the former rentcharges was extinguished by the disendowment, no apportionment in respect of the liability to repair can be made on the issue of redemption stock. Consequently, Plymouth Estates, Ld., will have to suffer a deduction from the stock issuable to it of an amount sufficient to meet, not a proportion, but the whole of the cost of future repairs to the chancel. As will appear later in this judgment, even if tithe rentcharge had never been extinguished, as it was, by the Tithe Act, 1936, on the hypothesis stated a corresponding result would have followed, and Plymouth Estates, Ld., would have been left to carry the whole burden of the repairs without any right of contribution against the Welsh Commissioners or the University of Wales.

For the purposes of this appeal, tithe rentcharge payable in respect of land in Wales can be divided into two classes, namely, tithe rentcharge the title to which is divested by force of the Welsh Church Acts and tithe rentcharge the title to which is left unaffected by those Acts. The former class vests in the Welsh Commissioners on the date of disestablishment and is by them transferable as to one of two sub-classes to the county councils and as to the other to the University of Wales. The tithe rentcharge which is to be transferred to the county councils is that which was formerly appropriated to the use of any parochial benefice: Welsh Church Act, 1914, s. 8, sub-s. 1 (*c*). The tithe rentcharge which is to be transferred to the University of Wales includes all tithe rentcharge ascertained to be Welsh ecclesiastical property which was not so appropriated, and includes the tithe rentcharge formerly belonging to the Ecclesiastical Commissioners with which we are concerned in this appeal. For convenience I will refer to the tithe rentcharge which is to be transferred to county councils as "tithe rentcharge in spiritual hands," to the tithe rentcharge which is to be transferred to the University of Wales as "tithe rentcharge belonging to the "Ecclesiastical Commissioners," and to tithe rentcharge in the hands of lay impropriators such as Plymouth Estates, Ld., whose title is not affected by the Welsh Church Acts as "laicized rentcharge."

It is not in question that before the date of disestablishment liability in respect of chancel repairs attached to the ownership of tithe rentcharges of each of these three classes. That liability existed and was enforceable under ecclesiastical law, which ceased to exist as law as from the date of disestablishment: Act of 1914, s. 3, sub-s. 1. Thenceforward, spiritual rentcharge, so long as it remained in the hands of, for example, an existing incumbent, carried with it the obligation in respect of chancel repairs by virtue of the statutory covenant imposed on members of the Church in Wales under s. 3, sub-s. 2, of the Act of 1914, a covenant which does not, of course, affect either the Ecclesiastical Commissioners or the Welsh Commissioners. In the case of laicized rentcharge, the obligation of the lay impropriators in respect of chancel repairs is preserved by s. 28 of the Act, but under sub-s. 2 of that section liability on a notional covenant is substituted for the liability under ecclesiastical law which had been abolished by s. 3. It is also beyond question that, in the case of tithe rentcharge in spiritual hands, the county councils, as transferees, were not to be under any liability for chancel repairs. In *Welsh Church Commissioners* v. *Representative Body of Church in Wales* (1) this court decided that during an intervening period when tithe rentcharge in spiritual hands was temporarily vested in the Welsh Church Commissioners they were under no liability in respect of chancel repairs since in regard to that class of rentcharge they were not "lay "impropriators" within the meaning of s. 28. The question raised in this appeal is different from that decided in the case just mentioned since it is concerned with tithe rentcharge belonging to the Ecclesiastical Commissioners.

With these prefatory observations I turn to s. 28 of the Welsh Church Act, 1914. Bennett J. held that, although the Ecclesiastical Commissioners were lay impropriators in the ordinary sense of that expression, they were not lay impropriators within the meaning of this section. He based his conclusion on certain words contained in the judgment of MacKinnon L.J. in *Welsh Church Commissioners* v. *Representative Body of the Church in Wales* (2). Bennett J., in my opinion, came to the right conclusion, but, as I do not think that MacKinnon L.J. was intending to refer to anything but the facts then before the court, I prefer to consider the matter without reference to the words on which Bennett J. relied.

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(1) [1940] Ch. 607.

(2) Ibid. 627.

The argument for the Representative Body was of this nature. The Ecclesiastical Commissioners were, it was said, immediately before disestablishment, "lay impropriators," and their liability in respect of chancel repairs was, therefore, expressly preserved by s. 28, but as upon disestablishment the tithe rentcharge belonging to them was ipso facto transferred to the Welsh Commissioners, the section, it was said, must be construed as imposing on the Ecclesiastical Commissioners, simultaneously with the divesting of their title, a liability in respect of repairs under the statutory covenant imposed by sub-s. 2. This covenant, it was conceded, could never have any operation as against the Ecclesiastical Commissioners themselves since they ceased to be owners of the rentcharge simultaneously with its imposition, but, as the statutory covenant is to run with the tithe rentcharge, it binds the Welsh Commissioners as transferees of the rentcharge and (but for the Tithe Act, 1936) would have bound the University of Wales as transferees from the Welsh Commissioners. In other words, Parliament intended the following operations to be treated as taking place simultaneously: (1.) divesting of the title of the Ecclesiastical Commissioners; (2.) while the title was, so to speak, in transitu, the imposition of the statutory covenant on the Ecclesiastical Commissioners; (3.) vesting of the tithe rentcharge in the Welsh Commissioners, subject to the statutory covenant. I think it unlikely that the clear and simple language of the section was intended by the legislature to cover conveyancing acrobatics of such a complicated and artificial kind as this, but the argument requires closer examination.

The object of the Welsh Church Acts was the disestablishment and disendowment of the Church in Wales. Disestablishment was effected by s. 3 of the Act of 1914, and disendowment by the provisions of that Act relating to property belonging to, or held for the benefit of, the church. The property affected is described in s. 4 of the Act and does not include property which, although in origin ecclesiastical, had been laicized before the date of disestablishment as, for example, the tithe rentcharge belonging to Plymouth Estates, Ld. The provisions of the Act of 1914 which brought about disendowment are contained in part I. under the captions

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TITHE REDEMPTION COMMISSION v. COMMISSIONERS OF CHURCH TEMPORALITIES IN WALES.

Lord Greene M.R.

"Vesting of property" (ss. 4 to 7), "Distribution of property" (s. 8) and "Border parishes" (s. 9). The machinery of disendowment falls into two parts: first, the divesting of church property from its owners and its vesting in the Welsh Commissioners who are a transitory and purely administrative body; secondly, its distribution among three bodies or groups of bodies, subject to special provisions with regard to burial grounds. Those three bodies are the Representative Body, the county councils, and the University of Wales. Tithe rentcharge, formerly in spiritual hands, was to be transferred to the county councils, and tithe rentcharge formerly belonging to the Ecclesiastical Commissioners was to be transferred to the University of Wales. Sect. 19 provides for the application of church property after its transfer to the county councils and the University respectively. Sect. 6 is for present purposes important. It provides that, as from the date of disestablishment, any liability or power of the Ecclesiastical Commissioners to make payments for any ecclesiastical purpose in or connected with the Church in Wales shall cease. Sect. 28, under the language of which liability for chancel repairs is said to follow the tithe rentcharge into the hands of the University, is contained in part IV. of the Act of 1914, the title of which is "Supplemental." If the results of the Act down to that point are considered, their effect, so far as regards the present question, is free from doubt. As from the date of disestablishment the following changes take place, namely, first, as to the rentcharge belonging to the Ecclesiastical Commissioners, (1.) this rentcharge is transferred to the Welsh Commissioners with a view to its ultimate transfer to the University of Wales, (2.) the powers and liabilities of the Ecclesiastical Commissioners in respect of chancel repairs come to an end under s. 6, (3.) no liability for chancel repairs attaches to the ownership of the rentcharge in the hands of the Welsh Commissioners (s. 3). Secondly, as to the tithe rentcharge belonging to Plymouth Estates, Ld., (1.) the title to this was not affected in any way, (2.) their liability in respect of chancel repairs ceased to be enforceable by reason of the provisions of s. 3. Bearing this in mind, I turn to s. 28 to see to what extent this supplemental provision affects the situation. As was pointed out by this court in *Welsh Church Commissioners* v. *Representative Body of the Church in Wales* (1), the section is a saving clause. So far as Plymouth Estates, Ld.,

(1) [1940] Ch. 607.

are concerned, their liability in respect of chancel repairs which would otherwise have been extinguished is preserved, but a new method of enforcement under a notional covenant is substituted for the original method of enforcement under ecclesiastical law. This is common ground. Does the section operate in the way suggested to keep alive the liability of the Ecclesiastical Commissioners by subjecting them to the notional covenant simultaneously with the transfer of the tithe rentcharge from them to the Welsh Commissioners? Quite apart from the fact that so striking a modification of the earlier provisions of the Act would not naturally be found in a section described as "supplemental," there appear to me to be two considerations which prevent any such effect being attributed to the section. First, it would be inconsistent with s. 6 to which I have already referred. That section without qualification extinguishes both the liability and the power of the Ecclesiastical Commissioners in respect of chancel repairs. I do not see how this can be reconciled with a construction of s. 28 which treats the liability as subsisting, if only momentarily, for the purpose of making the Ecclesiastical Commissioners parties to the notional covenant. Secondly, the language of s. 28 itself appears to me to contemplate that the party to a notional covenant will necessarily be a person whose liability subsists subsequently to the date of disestablishment, and is not apt to apply to the case where the liability is to cease on disestablishment. I base this view on the words of sub-s. 2 under which "such liability," that is, the liability which is preserved by sub-s. 1 is to be enforced as under a covenant with the Representative Body. There does not appear to be anything in the Act to prevent incorporation of the Representative Body under s. 13, sub-s. 2, before the date of disestablishment, but, in my opinion, the notional covenant under s. 28, sub-s. 2, is not intended to come into existence before that date. If it were otherwise, liability under the covenant and liability under ecclesiastical law would for a time co-exist.

In support of the argument for the Representative Body, a point was made which at first sight appears to be of importance. As I have already said, if the Welsh Church Acts are construed as extinguishing once for all on disestablishment the liability for chancel repairs which previously attached to the ownership of the tithe rentcharge belonging to the Ecclesiastical Commissioners, the result will be to leave Plymouth Estates, Ld., and other lay impropriators of the same kind to bear the whole burden of future repairs by deduction from the redemption stock issuable to them under the Tithe Act, 1936. If that Act had not been passed, the effect of such a construction would have been for practical purposes the same for this reason. Under the law as laid down by this court in *Wickhambrook Parochial Church Council* v. *Croxford* (1) the liability of every owner of tithe rentcharge is a several liability to repair the chancel, that is to say, a liability for the whole of the repairs, and is not limited to the amount actually received by him in respect of his rentcharge. It was also laid down that an owner who is being held liable for more than his proper share can obtain contribution from the other owners of tithe rentcharge in the parish. If, therefore, the liability attaching to the ownership of rentcharge belonging to the Ecclesiastical Commissioners was extinguished on disendowment, a lay impropriator in the position of Plymouth Estates, Ld., would have been left to bear the whole of the burden without having any one from whom contribution could be claimed. It is said that such a result could not have been intended by Parliament since the effect would be to deprive the lay impropriator of a valuable right without compensation.

In my opinion, this argument cannot prevail against what is the clear meaning of the Welsh Church Act, 1914. Its force is, I think, in any event very considerably diminished for the following reason. Until the point was settled by the decision in the *Wickhambrook* case (1) in 1935, there was no case which decided that the liability of the owner of tithe rentcharge extended beyond the amount of his actual receipts. This absence of authority was, no doubt, due to the fact that before the passing of the Chancel Repairs Act, 1932, the specific question would not arise in a civil court. At the date when the Welsh Church Act, 1914, was passed, the most authoritative writers on ecclesiastical law apparently held the view that the liability of the owner of tithe rentcharge was limited to the amount of his actual receipts: see Burn's Ecclesiastical Law, 1842, 9th ed., vol. i., p. 352; Phillimore's Ecclesiastical Law, 1895, 2nd ed., vol. ii., p. 1417, and the judgments of Lord Hanworth M.R. and Romer L.J. in the *Wickhambrook* case (2). It may well be that the legislature, if, indeed, it considered the matter at all, thought that a lay impropriator in the position of Plymouth Estates, Ld., could not in any circumstances be made

(1) [1935] 2 K. B. 417.

(2) Ibid. 430, 443.

liable beyond the amount of his receipts. It is, perhaps, equally likely that the legislature either did not consider the point or was not aware that there was in fact any tithe rentcharge which was divided between the Ecclesiastical Commissioners and a lay impropriator like Plymouth Estates, Ld. I should add that, apart from any special context, the Ecclesiastical Commissioners would, I think, be properly described as "lay "impropriators" which is the view taken by Bennett J. My decision rests on the opinion that in the special context of the Welsh Church Act, 1914, and particularly that of s. 28 the Ecclesiastical Commissioners are not included in that expression. I do not ignore the reference in s. 28 to the county councils, but I adhere to the opinion which was expressed by this court in the earlier case that this reference was inserted ex abundanti cautela. It was faintly suggested by Mr. Roxburgh as an alternative argument that, if the Ecclesiastical Commissioners cannot be regarded as lay impropriators for the purposes of s. 28, the Welsh Commissioners themselves ought to be so regarded, with the result that they and not the Ecclesiastical Commissioners would be the notional covenantors under the statutory covenant with the Representative Body. It is sufficient to say with regard to this argument that it cannot, in my opinion, be reconciled with the decision of this court in the earlier case. I would dismiss the appeal.

LUXMOORE L.J. I also am of opinion that these appeals fail. This is, I think, inevitable in view of the decision of this court in *Welsh Church Commissioners* v. *Representative Body of the Church in Wales* (1), for I agree with Bennett J. that that decision covers the cases before us.

GODDARD L.J. The points for decision are: (1.) Whether, at the date of the disestablishment of the Welsh Church, the Ecclesiastical Commissioners were lay impropriators of tithe rentcharge of the parishes in which it was paid to them within the meaning of s. 28 of the Welsh Church Act, 1914; (2.) if they were, did their liability to repair chancels which lay on them as lay impropriators pass to the Welsh Church Commissioners on the transfer to them of the tithe rentcharge, which, for brevity, I will refer to as tithe. That the Ecclesiastical Commissioners as a statutory body cannot have the cure of souls and so must be regarded as a lay corporation is admitted, but having regard to the avowed object of the Act in disendowing the Welsh Church it would be a remarkable result if Parliament had left such large tithe owners or their transferees under the obligation to repair chancels. For it is the right to receive tithe which imposes the liability. The Act does not, nor was it intended that it should, relieve the tithe payer of his liability to pay tithe. Its object was to divert the tithe from the church, and to apply it to secular purposes so that the tithe payer would not be supporting an ecclesiastical institution with which he was not in sympathy. In my opinion, the lay impropriator referred to in s. 28 is one who owns tithe as purely temporal property. For something like four hundred years a large part of the rectorial tithes in England and Wales has been in lay hands, and, like any other rentcharge, can be bought and sold in the market. Its ownership has carried with it the burden of repairing the chancel of the church of the parish in which the tithe-burdened lands are situate or for the benefit of which the tithe is paid if the burdened land is outside the parish. The owner is commonly referred to as the lay rector, and is, if an individual, entitled to a seat in the chancel.

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(1) [1940] Ch. 607.

A consideration of other sections makes it, in my opinion, clear that the Ecclesiastical Commissioners, though a lay body, were not intended to be classed as lay impropriators. By s. 4 there vests in the Welsh Commissioners from the date of disestablishment all property vested in the Ecclesiastical Commissioners which is ascertained to be Welsh ecclesiastical property. Sect. 5 provides for the method of ascertainment. The property of a lay impropriator is certainly not ecclesiastical property, and if any impropriator had placed it in trust for the benefit of the holder of an ecclesiastical office, which includes a benefice, or for any cathedral or ecclesiastical corporation, by s. 38 the property is to be deemed to belong to that office or corporation. This emphasizes, in my opinion, that the purpose for which the tithe is to be applied is the material consideration. Then s. 6 provides that, as from the date of disestablishment, any liability of the Ecclesiastical Commissioners to make payments for any ecclesiastical purpose, which clearly would include the repair of a chancel, in or connected with the Church in Wales, shall cease.

How, then, could any liability to repair an ecclesiastical building remain in the Ecclesiastical Commissioners after disestablishment ? As they were under no liability there was none for the Welsh Commissioners as their transferees to assume. In my opinion, the Act contemplates and deals with four different classes of tithe: (1.) That paid to ecclesiastical persons as such, (2.) that paid to the Ecclesiastical Commissioners, (3.) that paid to trustees who receive it on trust to apply it to the cure of souls, and (4.) that paid to lay impropriators who may hold it either beneficially or in trust for objects other than the cure of souls. It is only with the fourth class that s. 28 is concerned. Even if the Ecclesiastical Commissioners are to be regarded as lay impropriators for the purpose of the Act, it is impossible to suppose that Parliament meant, after relieving them by s. 6 of their obligation to repair, to reimpose it by s. 28. Moreover, by sub-s. 2, a notional covenant running with the land has to be envisaged between the lay impropriator and the Representative Body, and this court has decided that the lay impropriator referred to is the tithe owner at the time when the Act came into force. It follows that one would have to imply a covenant by the Ecclesiastical Commissioners, sealed immediately before the Act came into force or simultaneously with its taking effect, to perform an obligation of which the Act relieved them, the burden of which would then by force of the Act be transferred to and imposed on the Welsh Commissioners and ultimately on the University. It is impossible to suppose that Parliament intended anything of the sort.

The result is, no doubt, unfortunate for Plymouth Estates, Ld., and other lay impropriators in a like position. Where the tithe has been apportioned, as in the present case, it follows that the lay rectors remain under a liability to repair the chancel. Since *Wickhambrook Parochial Church Council* v. *Croxford* (1), their liability is not measured by the amount of the tithe they receive, and they have lost the right of contribution from the other tithe owner which that case decided they had. Indeed, the hardship which results was the strongest argument for the Representative Body. The peculiar position of a lay impropriator of an apportioned tithe was very probably overlooked when the Act was drafted, or, it may be, it was thought that the true view was that the tithe owner was only liable for repairs to the amount of the tithe which he received. For this view there was the support of text writers on ecclesiastical law of great eminence, though the *Wickhambrook* case (1) which is still open to review in the

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(1) [1935] 2 K. B. 417.

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House of Lords, decided otherwise, but as, in my opinion, the matter is not open to any other construction than that which we are now placing on it, an argument based on hardship, real though it be, cannot prevail. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Milles, Jennings White & Foster; Nicholl, Manisty & Co.; R. Primrose; A. D. Stocks.*

J. W. H.

UTHWATT J.
1943
Feb. 24, 25; *Apr.* 21.

RACECOURSE BETTING CONTROL BOARD *v.* SECRETARY FOR AIR.

Emergency legislation—Acquisition of land—Compensation—General Claims Tribunal — Proceedings before tribunal — Arbitration — Power to set aside award—Hypothetical lease—Duration—Occupation by Crown—Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*a*); *s.* 8, *sub-s.* 3.

The relegation by statute of the decision of a particular matter or matters of a particular class to a tribunal which is required to act on judicial lines, as is the General Claims Tribunal set up by s. 8, sub-s. 3, of the Compensation (Defence) Act, 1939, makes the proceedings before that tribunal " an arbitration under an Act " within s. 24 of the Arbitration Act, 1889, unless the tribunal is a court, which, on the true construction of the Compensation (Defence) Act, 1939, the General Claims Tribunal is not. Whether proceedings are an arbitration or proceedings before a court depends on the terms of the Act in question. To constitute an arbitration it is not necessary that the word " arbitration " should be used.

On the true construction of s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, there is not implied therein any suggestion as to the period of a hypothetical lease. The phrase " tenant in " occupation . . . . under a lease " is generally descriptive of the nature of the occupation without any implication as to its duration. For purposes of valuation for the assessment of compensation due effect must be given to the circumstances attending the Crown's occupation in the particular case, namely, the right to determine occupation at will, and the probable length of the occupation, or, in a case arising for adjudication after the occupation has ceased, the length in fact of that occupation. The section does not imply that the lease contemplated by sub-s. 1 (*a*) must be of such duration as is appropriate without reference to the emergency, and, at any rate, not less than the emergency.

The provision in sub-s. 1 (*c*) that, where possession is taken of agricultural lands, seeds and tillages are to be valued by reference to the amount which might reasonably be expected to be paid by an incoming tenant (a person not in occupation) does not justify the inference that, in cases coming within sub-s. 1 (*a*), the rent is to be assessed by reference to the value to a person in occupation.

MOTION.

The Secretary for Air, in the exercise of emergency powers as defined in s. 17 of the Compensation (Defence) Act, 1939, requisitioned racecourse totalisator buildings owned by the Racecourse Betting Control Board. The board claimed compensation under the Compensation (Defence) Act, 1939 (1) at the rate of 6602*l.* a year which was based on profits made by them in connexion with the buildings. The Secretary for

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(1) By s. 2, sub-s. 1, of the Compensation (Defence) Act, 1939: "The compensation payable "under this Act in respect of the "taking possession of any land "shall be the aggregate of the "following sums, that is to say,— "(*a*) a sum equal to the rent which "might reasonably be expected to "be payable by a tenant in occupation of the land, during the "period for which possession of "the land is retained in the "exercise of emergency powers, "under a lease granted immediately before the beginning of "that period, whereby the tenant "undertook to pay all usual "tenant's rates and taxes and to "bear the cost of the repairs and "insurance and the other expenses, if any, necessary to "maintain the land in a state to "command that rent, and (*b*) a "sum equal to the cost of making "good any damage to the land "which may have occurred during "the period for which possession "thereof is so retained (except in "so far as the damage has been "made good during that period "by a person acting on behalf of "His Majesty), no account being "taken of fair wear and tear or of "damage caused by war operations, and (*c*) in a case where "the land is agricultural land, a "sum equal to the amount (if any) "which might reasonably have "been expected to be payable in "addition to rent by an incoming "tenant, in respect of things "previously done for the purpose "of the cultivation of the land, "and in respect of seeds, tillages, "growing crops and other similar "matters, under a lease of the "land granted immediately before "possession thereof was taken in "the exercise of emergency powers ". . . . ."

By s. 7: "Any dispute as to "whether any compensation is "payable under this Act, or as to "the amount of any compensation "so payable, shall, in default of "agreement, be referred to, and "determined by, the appropriate "tribunal constituted under the "following provisions of this Act, "and the decision of that tribunal "shall be final: Provided that at "any stage in proceedings before "it, the tribunal may, and, if so "directed by the High Court, "shall, state in the form of a "special case for the opinion of "that Court any question of law

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Air contended that the buildings had no value for betting purposes when he requisitioned them and that 610*l.* a year would be fair compensation on the assumption that the buildings were temporarily used for some purpose such as storage. By a notification given by the board on August 13, 1940, pursuant to s. 8, sub-s. 3, of the Compensation (Defence) Act, 1939, and the rules made thereunder, the dispute was referred to the General Claims Tribunal for determination. Before the tribunal the board put forward three contentions: first, that s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, contemplated a hypothetical tenancy determinable at any time at the option of the tenant; secondly, that it contemplated a tenancy negotiated by a tenant already in occupation; and thirdly (which was alternative to the first contention), that the lease to be contemplated must be of such duration as to be appropriate without reference to the emergency giving rise to the requisition and, at any rate, not less than the duration of the emergency. The tribunal rejected the contentions, and awarded compensation at the rate of 610*l.* a year. The board now moved to set aside the award on the ground that it was erroneous in law on the face of it.

Sir Donald Somervell A.-G., *Danckwerts* and *H. L. Parker* for the Secretary for Air. The proceedings before the tribunal were not " an arbitration under an Act," and, therefore, the court cannot entertain a motion to set aside the decision within the meaning of s. 24 of the Arbitration Act, 1889, of the tribunal.

[The court directed that the motion should be opened.]

Comyns Carr K.C. and *F. Grant* for the Board. Any reference under a statute to a body which is not a court is "an arbitration under an Act" within s. 24 of the Arbitration

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"arising in the course of the "proceedings."

By s. 8, sub-s. 3: "For the "purpose of determining disputes "as to the payment of compensa-"tion under this Act, other than "disputes which by virtue of the "preceding provisions of this Act "are to be determined by the "Shipping Tribunal, there shall "be a General Claims Tribunal "(hereinafter referred to as ' the "' General Tribunal '), consisting "of not less than seven persons "appointed by the Lord Chancellor "(including a judge of the High "Court), together with a judge of "the Court of Session appointed "by the Lord President of the "Court of Session and a judge of "the High Court of Justice in "Northern Ireland appointed by "the Lord Chief Justice of North-"ern Ireland."

Act, 1889. The General Claims Tribunal is not a court, and, therefore, these proceedings were "an arbitration under an "Act," and, as such, can be reviewed by the court. The jurisdiction of the High Court to review arbitrations is inherent: *British Westinghouse Electric and Manufacturing Co., Ld.* v. *Underground Electric Railways Co. of London, Ld.* (1); *In re Jones and Carter's Arbitration* (2); and it is under that jurisdiction that any fault is to be put right, unless the Act establishing the tribunal prescribes another way of putting it right. Long before the existence of any Arbitration Act, the courts had power to, and did, set aside the awards of arbitrators if they found an error of law on the face of an award: *Fuller* v. *Fenwick* (3) and *Hodgkinson* v. *Fernie* (4). It is true that the court will not interfere with proceedings before a tribunal which the parties themselves have chosen: *Collins* v. *Collins* (5); *Law* v. *Garrett* (6); but that is not what the court is being asked to do here, and the provision in s. 7 of the Compensation (Defence) Act, 1939, that the decision of the tribunal "shall be final" does not preclude the court from reviewing an award. On the true construction of that Act there is an error of law on the face of this award. Sect. 2, sub-s. 1, of the Act follows closely the language of s. 22 of the Rating and Valuation Act, 1925: see, also, reg. 51 of the Defence (General) Regulations, 1939, which deals with the taking possession of land. With regard to "the rent which "might reasonably be expected to be payable" within the meaning of s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, the premises must be taken to be vacant and to let, notwithstanding that the words which immediately follow are "by a tenant in occupation of the land": see the opinion of Lord Herschell L.C. in *London County Council* v. *Erith (Churchwardens and Overseers)* (7), where he said: "Whether "the premises are in the occupation of the owner or not, the "question to be answered is: Supposing they were vacant "and to let, what rent might reasonably be expected to be "obtained for them?" In the present case, there must be a tenancy of some kind, and it must be for a fixed period, or, at any rate, for an ascertainable period. Otherwise the legislature would be doing the manifest injustice of depriving

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(1) [1912] A. C. 673.
(2) [1922] 2 Ch. 599.
(3) (1846) 3 C. B. 705.
(4) (1857) 3 C. B. (N. S.) 189.
(5) (1859) 28 L. J. (Ch.) 184
(6) (1878) 8 Ch. D. 26.
(7) [1893] A. C. 562, 588.

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a tenant in occupation of the whole of the goodwill of his business. Thus, under s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, it must, in view of Lord Herschell's opinion in *London County Council* v. *Erith* (*Churchwardens and Overseers*) (1), be contemplated that, the old lease having come to an end, a new one is being granted, and is to be taken at the rent which a tenant in occupation at the time would pay. The words "during the period for which possession of "the land is retained in the exercise of emergency powers" cannot indicate exactly how long the period will last, but, for valuation purposes, some assumption must be made, to arrive at the rent. The section must imply some period for the lease, and it is reasonably clear that "during the period for "which possession of the land is retained in the exercise of "emergency powers" means during the period for which the Crown is entitled to take possession. Therefore, the words "under a lease granted immediately before the beginning of "that period" must refer to a lease granted for such time as the Crown shall continue in occupation. As to the third contention, the appropriateness of the duration of the hypothetical lease is to be judged by taking into consideration, in each case, the usual lengths of leases of property of the class in question. On the second contention, assistance is to be had from sub-s. 1 (*c*). That paragraph provides that, in the case of agricultural land, the compensation is to be equal to the amount reasonably expected to be payable in addition to rent by an incoming tenant in respect of reasonable acts of cultivation and of such things as seeds, tillages and growing crops. That is a clear reference to the value of those things and matters to an incoming tenant. Sub-s. 1 (*a*) prescribes compensation equal to the rent reasonably to be expected from a tenant in occupation and the rent for the hypothetical tenancy is to be assessed by reference to the value to such a tenant.

Sir Donald Somervell A.-G., *Danckwerts* and *H. L. Parker* for the Secretary for Air. It is true that the jurisdiction of the court to review arbitration awards is inherent: *British Westinghouse Electric and Manufacturing Co., Ld.* v. *Underground Electric Railways Co. of London, Ld.* (2) which was followed in *F. R. Absalom, Ld.* v. *Great Western* (*London*) *Garden Village Society* (3), which distinguished *Hodgkinson* v.

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(1) [1893] A. C. 562, 588.

(2) [1912] A. C. 673.

(3) [1933] A. C. 592.

Fernie (1). As far back as 1807, the setting aside of an award on the ground of a mistake of law was a known procedure: *Nichols* v. *Chalie* (2), but proceedings before the General Claims Tribunal are not an arbitration: see the judgments of Lord Hewart C.J. and Shearman J. in *Rex* v. *Minister of Labour* (3) and the observations of Manisty J. and Watkin Williams J. in *Bexley Local Government Board* v. *West Kent Sewerage Board* (4). Such a case as *Law* v. *Garrett* (5) does not show that the tribunal is an arbitrator. *In re Jones and Carter's Arbitration* (6) is distinguishable, because it had to do with the jurisdiction of the court to set aside an award under the Agricultural Holdings Act, 1908, which specifically provides for arbitration. The words "referred to" in s. 7 of the Compensation (Defence) Act, 1939, cannot be shown to imply arbitration proceedings: see the judgment of Lord Esher M.R. in *Munday* v. *Norton* (7). Had it been intended to make proceedings of this kind an arbitration, it would have been easy to say so. By s. 9, sub-s. 1 (*b*), of the Arbitration Act, 1934, an arbitrator may, or if so directed by the court, must state his award in the form of a special case, but the General Claims Tribunal has no power so to state its award nor has the court power to order it to do so. These powers are omitted although there is, in the proviso to s. 7 of the Act of 1939, an enactment in substantially the same terms as s. 9, sub-s. 1 (*a*), of the Act of 1934. The omission would, therefore, seem to be deliberate as not being appropriate to proceedings which were not an arbitration. Moreover the general power to make rules of procedure contained in s. 9 of the Act of 1939 is much more indicative of a tribunal set up to decide a certain class of matter than of a statutory arbitral tribunal. The court has, therefore, no power to deal with this matter.

To succeed on the motion, the board must show that the tribunal went wrong in law. If "the lease" had to be "of such "duration as is 'appropriate' without reference to the "emergency," the tribunal would have to contemplate, if the land was building land, that it would be let normally on a 99 years' lease. Therefore, the tribunal would have to assume the existence of a 99 years' lease, and assume, also, that the rent paid at present would be the same during the emergency period as afterwards. That cannot be right, because it is against what the Act both says and contemplates, and would, in fact, lead to the payment of compensation twice over. The lease cannot continue beyond the emergency. The tribunal is entitled to consider whether "the period for which possession "of the land is retained in the exercise of emergency powers" is likely to be the whole of the emergency period. The board contends that the lease must be for a period beyond the war, or, alternatively, that a lease for the whole period of the emergency must be assumed, but neither alternative can possibly stand.

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(1) 3 C. B. (N. S.) 189.
(2) (1807) 14 Ves. Jun. 265, 266.
(3) [1924] 2 K. B. 210, 218.
(4) (1882) 9 Q. B. D. 518.
(5) 8 Ch. D. 26.
(6) [1922] 2 Ch. 599.
(7) [1892] 1 Q. B. 403.

Comyns Carr K.C. in reply referred to Russell on Arbitration, 13th ed., p. 167; *In re an arbitration between Stringer and Riley, Brothers* (1); *In re an arbitration between Croasdell and Cammell Laird & Co., Ld.* (2); *Cooper* v. —— (3); *Greenhill* v. *Church* (4); *Kent* v. *Elstob* (5); *Newry and Enniskillen Ry. Co.* v. *Ulster Ry. Co.* (6); *Bexley Local Government Board* v. *West Kent Sewerage Board* (7); *Tabernacle Permanent Building Society* v. *Knight* (8).

Cur. adv. vult.

Apr. 21. UTHWATT J. read the following judgment. A preliminary objection was taken by the Attorney-General to the jurisdiction of the court. The first answer made by the Racecourse Betting Control Board was that the proceedings before the tribunal were "an arbitration under an Act" within the meaning of s. 24 of the Arbitration Act, 1889. That is the contention which I propose first to consider.

The Arbitration Act, 1889, does not contain any definition of an arbitration, but that the term "arbitration" has a wide meaning may be gathered from the decisions in *Law* v. *Garrett* (9), a case under the Common Law Procedure Act, 1854; *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society* (10) and *The Cap Blanco* (11), both cases under the Arbitration Act, 1889, where agreements to refer disputes to a foreign court were held to be submissions to arbitration. To my mind, the relegation by statute of the decision of a

(1) [1901] 1 K. B. 105.
(2) [1906] 2 K. B. 569, 572.
(3) (1671 or 1672) 3 Reports in Chancery, 42.
(4) (1635) Ibid. 49.
(5) (1802) 3 East 18.
(6) (1856) 8 De G. M. & G. 487.
(7) 9 Q. B. D. 518.
(8) [1892] A. C. 298.
(9) 8 Ch. D. 26.
(10) [1903] 1 K.B. 249.
(11) [1913] P. 130.

particular matter or matters of a particular class to a tribunal required to act on judicial lines—and clearly the tribunals set up by the Compensation (Defence) Act, 1939, are so required to act—makes the proceedings before the tribunal an arbitration under an Act unless the tribunal is a court. There does not appear to me to be any other alternative. Whether the proceedings are an arbitration under an Act or proceedings before a court depends on the terms of the Act. To constitute an arbitration it is not necessary, in my view, that the word "arbitration" should, in fact, be used.

Upon the Act several matters may be observed. First, the functions of the tribunal are limited to ascertaining the amount of compensation, a matter which falls peculiarly within the province of arbitration. Secondly, the tribunals have no power to enforce orders made by them. Where circumstances so require, an order can be obtained from the High Court, under s. 9, sub-s. 3, and it will be disobedience to the order of the High Court which will be punished, not disobedience to the order of the tribunal. Thirdly, the Act does not require the tribunals to hear cases in public. Fourthly, the adjudicating bodies are called "tribunals," a term which, to my mind, unless controlled by any context, suggests something other than a court. There is no such context. Such guidance as can be obtained from the language of the Act points to arbitration, for the disputes are described as matters to be "referred," a phrase suggestive of arbitration proceedings. Fifthly, the jurisdiction of the tribunals extends as well to Scotland and Northern Ireland as to England and Wales and the setting up of a single court with original jurisdiction for those three countries is, to say the least, unlikely. Lastly, if the tribunals were intended to be courts, there is no reason why they should not have been so described, or, following the precedent of s. 12, sub-s. 5, of the London Passenger Transport Act, 1933, expressly made "courts of "record." In my opinion, the result is that the tribunals are not courts, and, that alternative being rejected, the proceedings before the tribunals are "an arbitration under an "Act" within the meaning of the Arbitration Act, 1889. On this basis it was conceded that there was jurisdiction to hear the motion, notwithstanding that the decision of the tribunals is expressed to be final.

I turn now to consider the question whether there is any error of law appearing on the face of the award. Three errors

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of construction of s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, are suggested as involved in the rejection stated in the award of three contentions which were put forward. The relevant sections are, first, s. 1, which provides: "Where, in the exercise of emergency powers during the "period beginning with August 24, 1939, and ending with "such day as His Majesty may by order in council declare "to be the day on which the emergency comes to an end ". . . . (*a*) possession of any land has been taken on behalf "of His Majesty . . . . then, subject to the following "provisions of this Act, compensation assessed in accordance "with those provisions shall be paid, out of moneys provided "by Parliament, in respect of the taking possession of the "land . . . ." Sect. 2, sub-s. 1, provides: "The com-"pensation payable under this Act in respect of the taking "possession of any land shall be the aggregate of the following "sums, that is to say,—(*a*) a sum equal to the rent which might "reasonably be expected to be payable by a tenant in "occupation of the land, during the period for which possession "of the land is retained in the exercise of emergency powers, "under a lease granted immediately before the beginning of "that period, whereby the tenant undertook to pay all usual "tenant's rates and taxes and to bear the cost of the repairs "and insurance and the other expenses, if any, necessary to "maintain the land in a state to command that rent . . . ." Sect. 17 defines "emergency powers" as meaning powers conferred by any regulations made under the Emergency Powers (Defence) Act, 1939, s. 52 of the Telegraph Act, 1863, or s. 7 of the Air Navigation Act, 1920, as amended by any subsequent enactment or "any power exercisable by virtue "of the prerogative of the Crown." The first contention rejected by the tribunal is: "That s. 2, sub-s. 1 (*a*), of the "Compensation (Defence) Act, 1939, contemplates a "hypothetical tenancy determinable at any time at the "option of the tenant." The argument in favour of this contention comes to this. There cannot in law be a lease except for a period which is fixed by the lease or which is, pursuant to some provision contained in the lease, capable of being ascertained. Further, it was stated in argument that, to estimate the rent, it is necessary, in the art of valuation, to make some assumption as to the period of the duration of the lease. Therefore, some period for the lease must be implied in the section. That is the first proposition. The second proposition is that, where possession of land is taken under any of the emergency powers referred to in the Act, the Crown is at liberty to give up possession at any time without notice. The conclusion sought to be drawn is that the lease assumed by the section must, as a matter of construction of the section, be taken to be a lease determinable at any time at the tenant's option.

In my opinion, this argument should be rejected. I see no reason for thinking that there is implicit in the section as a matter of construction any suggestion as to the period of a hypothetical lease. It is the meaning of the phrase "tenant "in occupation . . . . under a lease" which has to be construed, not the word "lease." That phrase is, I think, completely satisfied if it is regarded as generally descriptive of the nature of the occupation without any implication as to the duration of that occupation, and, in my opinion, this is the proper construction of the section. On this basis, the rule of law requiring a period to be set on a lease does not arise for consideration at all. So far as the needs of the valuers are concerned, due effect will, as incident to the art of valuation and not as a result of this construction of the section, be given to the circumstances attending the Crown's occupation in any particular case, namely, the right to determine occupation at will, and, I may add, what is no less important, the probable length of the Crown's occupation, or (see *Bwllfa and Merthyr Dare Steam Collieries* (1891) v. *Pontypridd Waterworks Co.* (1)) in a case arising for adjudication after the Crown's occupation has ceased, the length in fact of that occupation.

That is sufficient to dispose of the first contention, but two observations may be made on the second proposition embodied in the argument. As the regulations made under the Emergency Powers (Defence) Act, 1939, now stand, it is true that in all cases to which the Compensation (Defence) Act, 1939, applies possession may be given up by the Crown at will. That would cease to be true if a regulation were made—and I see no reason why some such regulation could not be lawfully made—under which the Crown were required to give some reasonable notice to the owner before possession of his land were handed back to him. The second proposition assumes that no such regulation is possible. Unless the second proposition can properly take the form that in all possible cases the Crown can determine its possession at will, it finds no place in an argument for the conclusion sought to be drawn. Again, the second proposition takes into account only one of the circumstances attendant on the Crown's occupation, the right to determine at will, and excludes from consideration another equally material circumstance, namely, the probable length of the Crown's occupation, or, in a case arising for adjudication after possession has ceased, the actual length of the Crown's occupation. To my mind, there is no reason why the one circumstance rather than the other should hold the field in the argument. Lastly, as I understood Mr. Carr, his argument on the first contention ultimately took the form that the section should be read as if the words " under a lease " meant "under a lease for that period," that is to say, the period of the Crown's occupation. As regards this, it is sufficient to say that it is not the contention rejected by the tribunal, with which alone I have to deal.

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(1) [1903] A. C. 426.

The third contention rejected by the tribunal is an alternative to the first contention, and runs as follows: " Alternatively, that the lease to be contemplated must be of such "duration as is appropriate without reference to the "emergency and at any rate not less than the duration of the "emergency." The construction which I have given to the section in dealing with the first contention disposes of this third contention, but there are other objections to it. First, the gloss involved in the construction contended for is vague and uncertain. " Appropriate," I was instructed, was intended by the author of the formula embodied in the contention to mean " appropriate having regard to the length of term "usually created in leases of property of the class to which "the property in issue in any particular case belonged." I cannot assume, indeed, common knowledge rejects the assumption, that all properties—and sub-s. 1 (*a*) is equally applicable to all lands—are capable of being classified and labelled in this way. I, therefore, see no reason for reading into the section a gloss which includes the word " appropriate " in the sense stated above, and I cannot attribute to it any other meaning which would get rid of the vice of uncertainty. Secondly, the contention involves that the lease to be assumed is to be at least for the duration of " the emergency." One may be inclined to assume that the " emergency " referred to in the formula is the emergency defined by the Act, namely, the emergency that was the occasion of its passing. It is also to be observed that the Act applies to cases where possession is taken under s. 52 of the Telegraph Act, 1863. The reference to "emergency" in that section is to an emergency making it "expedient" that the government should assume control over messages by the telegraph companies therein referred to, and under that Act possession is taken and retained of works by warrants which, though successive warrants may be issued, remain in force only for a week. Again, in s. 7 of the Air Navigation Act, 1920, another emergency power, referred to in the Act as the power of "taking possession," is exercisable "in time of war, whether actual or imminent, or of great "national emergency." The word "emergency," as used in the formula, may, therefore, require different meanings to be attributed to it having regard to the power in right of which possession was taken. However this may be, I see no reason why the duration of the occasion which gives rise to the exercise of the power should, as a matter of construction of the section, be imported into a hypothetical lease by reference to whose rent compensation is to be measured.

The second contention rejected by the tribunal is that s. 2, sub-s. 1 (*a*), contemplates a hypothetical tenancy negotiated by a tenant already in occupation. The argument put forward in favour of that contention was that s. 2, sub-s. 1 (*c*), provided that, where possession was taken of agricultural land, seeds and tillages were to be valued by reference to the amount which might reasonably be expected to be paid by an incoming tenant and that the express reference in this particular case to the value to a person not in occupation justified the inference that in sub-s. 1 (*a*) the rent was to be assessed by reference to the value to the person in occupation. To my mind, there is no substance in that argument. An express provision that tillages and seeds are to be taken at their value to an incoming tenant—a provision which rules out their value to the owner—is no reason for inferring that in the provision dealing with land—which applies to agricultural land as well as to other land—a contrary course is directed to be taken. Indeed, one who was obsessed with a desire for consistency might well draw an entirely different inference from the fact on which the argument is founded. I draw no inference. In the result the motion is refused, with costs.

Solicitors for Racecourse Betting Control Board: *Sharpe, Pritchard & Co.*

Solicitor for defendants: *Treasury Solicitor.*

K. R. A. H.

C. A.

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Apr. 20.

In re A DEBTOR (No. 27 of 1943).

Bankruptcy—Receiving order—Proof of debt—No notice of intention to dispute—Admission before registrar—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 2—*Bankruptcy Rules,* 1915 (*St. R. & O.,* 1914, *No.* 1824), *r.* 171.

By the Bankruptcy Act, 1914, s. 5, sub-s. 2: "At the hearing [of "a bankruptcy petition] the court shall require proof of the debt "of the petitioning creditor . . . . and, if satisfied with the proof, "may make a receiving order in pursuance of the petition." By the Bankruptcy Rules, 1915, r. 171: "On the appearance of the "debtor to show cause against the petition, the petitioning "creditor's debt, and the act of bankruptcy, or such of those "matters as the debtor shall have given notice that he intends "to dispute, shall be proved . . . ."

Where the debtor had not given notice that he intended to dispute the petitioning creditors' debt and he admitted it at the hearing of the petition:—

Held, that it was not necessary for the petitioning creditors, at the hearing of the petition, to prove the debt by production of the usual affidavit, but that it was competent for the registrar to make a receiving order subject to the filing on the same day of an affidavit proving the debt.

In re a Debtor [1935] Ch. 353 distinguished.

The note to r. 171 in Williams on Bankruptcy, 15th ed., p. 589, referring to that case as authority for the statement that "admission or consent was insufficient," disapproved.

Appeal from the registrar.

By a petition, dated February 24, 1943, creditors petitioned for a receiving order against the debtor on the ground that he was indebted to them in the sum of 105*l.* 11*s.* 3*d.* The debtor gave no notice of his intention to dispute the debt, and at the hearing of the petition by the registrar he admitted it. No evidence having been adduced by the petitioning creditors to prove the debt, the registrar made a receiving order, subject to the filing on the same day of an affidavit proving the debt, and this was duly done. The debtor appealed.

George Kingham for the debtor. Sect. 5, sub-s. 2, of the Bankruptcy Act, 1914, requiring that the debt shall be proved at the hearing of a petition for a receiving order was not complied with, and, therefore, it was not competent for the registrar to make the receiving order. Admission of the debt is not sufficient proof of it: *In re a Debtor* (1). It is true that

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(1) [1935] Ch. 353.

r. 171 only provides in terms for proof when notice has been given of intention to dispute, but in Williams on Bankruptcy, 15th ed., p. 589, *In re a Debtor* (1) is given as authority for the statement: "Admission or consent is insufficient." It is there pointed out that "bankruptcy being a matter which "affects the general public the court must see that all require-"ments of the Act and the rules have been carried out . . . ." It is not contended that r. 171 is ultra vires, and so its provisions must be observed. A receiving order counts from the time it is made and not from the time it is drawn up. Here it was made before proof of the debt had been filed, and that is not in accordance with r. 171.

Seuffert, for the petitioning creditors, was not called on to argue.

LORD GREENE M.R. In this case the petitioning creditors did not, at the time of the hearing of their application for a receiving order, produce the usual affidavit that the debt was owing. The fact that it was owing was admitted by the debtor at the hearing, and the registrar made the order subject to an affidavit being filed on that day to prove the debt. That affidavit was, in fact, filed on that day, and the matter would appear, therefore, to be perfectly regular, but the point is taken that it was technically necessary that the debt should have been proved before the order was made. That argument is based on the decision in *In re a Debtor* (1), the effect of which is stated in the note to r. 171 of the Bankruptcy Rules, 1915, in Williams on Bankruptcy, 15th ed., p. 589, to be that "admission or consent was insufficient." The section on which that is based is s. 5, sub-s. 2, of the Bankruptcy Act, 1914. Reading that sub-section by itself, it would be thought that admission of the debt was sufficient proof of it, for admission is a form of proof, and that this was the view of those framing the Bankruptcy Rules appears from r. 171. The effect of the section and the rule, taken together, would seem prima facie to be that, if the debtor admits the debt and has given no notice to dispute it, that can be accepted as proof of the debt. In *In re a Debtor* (1) a notice to dispute had been filed under r. 171, and, therefore, the condition on which the obligation to prove the debt arose had been satisfied. The debt there was a moneylender's debt, and in the case of such a debt the court is bound to require proof of a very different

(1) [1935] Ch. 353.

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nature from that which is required in the ordinary case. Having called attention to the fact that there had been a notice to dispute, Lord Hanworth said: "I also call attention to the "fact that an admission is not sufficient in bankruptcy proceedings; the court is acting not merely inter partes but "in the public interest, and that being so the court has a public "function and duty to perform and is bound to perform it." That passage, taken out of its context, would appear to indicate that r. 171 was in some way ultra vires, but, in my opinion, Lord Hanworth's language must be read in its context and in reference to the fact that the case was one where a notice to dispute had been filed, so that the rule specifically came into operation. I am not casting any reflection on the general practice of calling for an affidavit of proof in all cases, but on the facts of this case, there being no notice to dispute the debt, it seems to me that the section and the rule have been complied with. The appeal, therefore, fails.

MACKINNON L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *Spiro & Co.; Leslie J. Griffin.*

H. C. G.

In re A DEBTOR (No. 6 of 1941).

C. A.
1943
Mar. 22, 23.

Bankruptcy—Receiving order—Secured creditor—No credit for security given in petition—Validity of receiving order—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 4, *sub-s.* 2.

By a letter dated August 14, 1939, the debtor undertook, for consideration, to pay 20,000*l.* to the creditor by September 30, 1939, this sum being the price of shares belonging to the creditor for which the debtor had undertaken, but failed, to find a purchaser. The debtor having failed to pay the money on the due date, the creditor obtained judgment against him for 20,000*l.*, the price of the shares, on a specially endorsed writ. Later, a receiving order was made against the debtor on the petition of the creditor which was based on the judgment for 20,000*l.*:—

Held, (1.) that although the creditor had obtained his judgment in a wrong form and for an excessive amount (since he ought to have sued either for damages or for specific performance), yet, as a judgment obtained in proceedings in proper form would have provided a good petitioning creditor's debt, it was not a ground for rescinding the receiving order, for the amount of the debt could be left to be scaled down at the stage of proof in the bankruptcy; but (2.) that the petitioning creditor was a secured creditor within s. 167 of the Bankruptcy Act, 1914, he having a lien on the shares for unpaid purchase money, and that, as he had failed to comply with s. 4, sub-s. 2, of the Act, under which he should have abandoned his security for the benefit of all the creditors or estimated its value, the receiving order must be rescinded.

Appeal from the Divisional Court.

On November 16, 1942, a receiving order was made against the debtor by the registrar of Northampton county court on the petition of a creditor who claimed that the debtor was indebted to him in the sum of 20,000*l.* and 11*l.* 5*s.* costs on a judgment in the King's Bench Division dated November 23, 1939. This judgment was obtained on a specially endorsed writ dated October 18, 1939, in the following circumstances. The petitioning creditor having subscribed for 40,000 preference shares of 10*s.* each in Joshua Bigwood & Sons, Ld., the debtor agreed to sell the shares for him. On August 14, 1939, the debtor, who had failed to find a purchaser, wrote the following letter to the petitioning creditor headed with the name of the company: "In consideration of your extending "until September 30, 1939, the time for payment of 20,000*l.*, "being the amount for which I agreed to sell your preference "shares in the above company, I hereby undertake to pay to "you the said sum of 20,000*l*. by the before mentioned date." It was for breach of this undertaking that the judgment for 20,000*l*. and costs was obtained. On December 1, 1942, the debtor applied for an order rescinding or varying the receiving order. The registrar of Northampton county court dismissed the application, and the Divisional Court (Farwell and Uthwatt JJ.) dismissed an appeal from his decision. The debtor appealed.

W. Summerfield for the debtor. The judgment for 20,000*l*. obtained by the petitioning creditor was given in proceedings that were wrong in form and for an excessive amount, for he claimed at the same time to retain the shares in respect of which he had received dividends. His proper remedy was either specific performance or damages. The court of bankruptcy has power to go behind the judgment on which a receiving order is based at the instance of the debtor: *Ex parte Lennox* (1); *In re Flatau* (2); *In re Hawkins* (3). Therefore this receiving order, which was based on the judgment, is bad. The Divisional Court said that the debtor ought to have appealed from the judgment and not waited for three years, but the authorities cited show that when the court is satisfied that there is a prima facie case for investigating the grounds on which a receiving order has been obtained, the whole proceedings will be held up till the investigation has been made, and that in a proper case the court will rescind the receiving order. A judgment which is wrong in form cannot properly afford a basis for a receiving order. [LORD GREENE M.R. If on the evidence a sum is due to the petitioning creditor sufficient to entitle him to a receiving order, is not that sufficient and is not the right time to scale down the amount of the debt, when the debtor comes to prove for it?] It is not enough that the petitioning creditor might have recovered a sufficient sum in an action brought in proper form. Secondly, the petitioning creditor was a secured creditor within s. 167 of the Bankruptcy Act, 1914, and he failed to disclose his security in accordance with s. 4, sub-s. 2, of that Act (4). He had a vendor's lien for the unpaid purchase money on the shares he had agreed to sell. It is not as if he had treated the contract as at an end and sued for damages for the breach thereof. By suing for the amount of the purchase money he treated the contract as still on foot. In equity the court would say that, as he had obtained a judgment for the amount of the purchase price, the shares were the property of the purchaser, subject to the vendor's lien for unpaid purchase money. Therefore, although the petitioning creditor might in fact be owed sufficient to justify his application for a receiving order, there is nothing to show a good petitioning debt until the shares have been valued. Section 4, sub-s. 2, of the Act provides that, if a petitioning creditor is a secured creditor, he must by his petition state that he is willing to surrender his security for the benefit of all the creditors or value his security. That was not done and, therefore, the receiving order ought to be rescinded on that ground, too.

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(1) (1885) 16 Q. B. D. 315.

(2) (1888) 22 Q. B. D. 83.

(3) [1895] 1 Q. B. 404.

(4) Bankruptcy Act, 1914, s. 4, sub-s. 2: "If the petitioning "creditor is a secured creditor, "he must in his petition either "state that he is willing to give "up his security for the benefit "of the creditors in the event of "the debtor being adjudged bank- "rupt, or give an estimate of the

Seuffert for the petitioning creditor who was called on to argue the second point only. The creditor was not a "secured "creditor" within s. 167 of the Bankruptcy Act, 1914. The debtor could never say the shares were his or have dealt with them in any way till he had satisfied the judgment, and until then the shares remained the property of the petitioning creditor (*In re Burr* (1)) and no one can have a lien on his own property. [LORD GREENE M.R. On the sale the debtor became entitled to the shares but the petitioning creditor was entitled to retain them until the purchase price was paid by virtue of his unpaid vendor's lien: *Paine* v. *Hutchinson* (2).] It is the tendering of the purchase money that affects the proprietary right to the shares. Even if the petitioning creditor ought to have stated that he was a secured creditor, he could obtain leave to amend and that leave is now asked for.

LORD GREENE M.R. The agreement contained in the

"value of his security. In the "latter case, he may be admitted "as a petitioning creditor to the "extent of the balance of the debt "due to him, after deducting the "value so estimated in the same "manner as if he were an un-"secured creditor."

By s. 167: "'Secured creditor' "means a person holding a mort-"gage charge or lien on the "property of the debtor, or any "part thereof, as a security for a "debt due to him from the "debtor."

(1) (1892) 67 L. T. 465.

(2) (1868) L. R. 3 Ch. 388.

letter of August 14, 1939, was, on its true construction a contract of sale to come into existence on the default of the debtor in finding a purchaser of the 40,000 shares for the sum and by the date mentioned. On this default he came under an obligation to take over the shares himself and to pay the purchase price. The other point to notice about the document is that it is a contract for the sale of specific shares. The relief claimed by the petitioning creditor by the writ dated October 18, 1939, was, in my opinion, misconceived. He was suing for the purchase price of the shares—not for damages for breach of the contract or for specific performance of it, and he obtained his judgment without any reference to the position with regard to the shares. His attitude, both in his affidavit and before the county court registrar as well as in this court, has been that he was at the same time entitled to the benefit of the judgment and to the shares. Any more unjust result I cannot imagine and I should be surprised if the law was such as to entitle him to this.

In my opinion, the judgment ought not to have been given. The creditor could have sued for damages, in which case he would have treated the contract as at an end, or he could have affirmed the contract and sued for specific performance. Instead of doing either he took the wholly unprecedented course of merely suing for the purchase price, and he obtained a judgment for the purchase price without any of the corresponding directions which ought to appear in a specific performance order. The first point taken on behalf of the debtor was that this judgment, on the face of it, was one which justified an inquiry, and that, having regard to its peculiar nature, the judgment debt ought not to be treated as a good petitioning creditor's debt. It was said that the judgment ought in bankruptcy to be regarded as a judgment for damages, and that, as the amount of the damages has not yet been ascertained, no receiving order ought to have been made and the order which was made ought to be rescinded. The Divisional Court appears to have taken the view that the proper time to deal with the judgment would be at the stage of proof and not at the stage of petition. In my opinion, they took the right view, for the evidence shows that damage had in fact been suffered, and, if this judgment were regarded as one for damages and scaled down in bankruptcy, it would nevertheless leave a good petitioning creditor's debt. If that be so, the court, in its discretion, ought not, in my opinion, to say that the receiving order ought to be rescinded on this ground, but ought to leave the matter to be dealt with at the stage of proof. On the basis that the judgment ought to be regarded in bankruptcy as one for damages and that such a judgment could have been given in appropriate proceedings, it is not disputed that the amount of the damages would have been a good petitioning creditor's debt. The position would have been different if this had been a case where the judgment, regarded as a judgment for damages, had been obtained in circumstances of unfairness or fraud, or on one of the other grounds which in bankruptcy afford justification for examining a judgment. In my opinion, the view of the Divisional Court on this point is one which it was entitled in its discretion to take and with which we ought not to interfere.

The second point is much more serious. The petitioning creditor claims that he has a debt in respect of which he can prove against the assets in competition with the other creditors without bringing into the pool the value of the shares which he maintains are his absolute property. The whole question depends on whether, at the date when the petition was presented, the petitioning creditor was a secured creditor within the meaning of s. 4, sub-s. 2. The true nature of the contract being, as I have stated, a contract for the purchase of specific shares, the property in the shares in equity belonged to the debtor as purchaser, with the corresponding obligation on his part, if these had been partly paid shares, to indemnify the vendor against calls, and with all the other consequential results which follow on a contract of sale. Sir William Page Wood, sitting in this court, in *Paine* v. *Hutchinson* (1) said, in reference to the facts of the case then before him (2): "The shares stood in Cruse's name, but, from the moment "they were bought by the plaintiffs, they became the property "in equity of the plaintiffs, and Cruse was a mere trustee for "them," and in Fry on Specific Performance, 6th ed., p. 678, the learned author says: "The vendor or purchaser of shares "may generally, as we have already seen, maintain an action "for specific performance of the contract; he will be "entitled to a direction that the defendant execute a proper "deed of transfer and concur in all steps necessary to procure "its registration, and also, in the case of the vendor being "plaintiff, to a declaration of his right to indemnity in respect "of calls on the shares accruing after the purchaser has become

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(1) L. R. 3 Ch. 388.

(2) Ibid. 390.

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"the owner in equity." In the present case the petitioning creditor, as vendor, has not elected to treat the contract as discharged and to sue for damages for its breach. By the issue of his writ for the purchase price, he affirmed the contract, and, having obtained judgment for the purchase price, he cannot keep its benefit without acknowledging that the contract still subsists and carries with it the obligation to transfer the shares when the purchase price is tendered. It would be open to the debtor, if he had the money, to go to the petitioning creditor with the amount of the judgment and offer it to him against a transfer of the shares, and the petitioning creditor would be bound to transfer the shares. The contract has never ceased to exist. If I am right in thinking that the equitable property in the shares is vested in the debtor and that the creditor is entitled to refuse to transfer the shares until the purchase money comprised in the judgment has been paid, the creditor is a secured creditor within the definition in s. 167. He is entitled to keep what in equity is the property of the debtor until the debtor pays the purchase price, and, therefore, he has in equity security over the interest of the debtor. If the creditor had treated the contract as at an end and sued for damages, all he would have got would have been judgment for the difference between the value of the shares and the sum of 20,000*l.* That would have been the sum on which he could have based his petition and in respect of which he could have proved in competition with the other creditors. The creditor, however, says that he is entitled to prove in competition with the other creditors for the full amount of the judgment without bringing into the pool the shares which on satisfaction of the judgment the debtor is entitled to have transferred to him. If that claim were right, it would mean not merely that in the petition he was entitled to say nothing about the shares, but that when he comes to the stage of proof he is entitled to put in a proof for 20,000*l.* and keep the shares. In my opinion, that is the very thing which s. 4, sub-s. 2, was intended to prevent. I have no doubt that the petitioning creditor is a secured creditor, and the result is that the receiving order ought never to have been made.

We were referred to *In re Burr* (1), but that was entirely different from the present case. There a creditor attempted to prove in the bankruptcy for a debt which was alleged to arise under an order for specific performance of a contract to sell a policy of insurance. The order for specific performance was in the usual form and contemplated the simultaneous transfer of the policy and payment of the purchase price. Such an order on the face of it does not give rise to a debt. It is an order for specific performance, which is a totally different thing. The proof was objected to on the ground that the alleged creditor had omitted to mention and value his policy, and he then sought to withdraw his proof. It was held that he was entitled to do so, on the ground that he had not got a debt in respect of which he could prove. Lord Esher M.R. said that "the judgment for specific performance "did not create a judgment debt." He also said that "the "contract did not pass the property in the policy or create a "debt" but I should have thought that it passed an equitable interest in the policy. It was not, however, necessary to deal with that matter in the judgment because the conclusive reason for the decision was that there was no debt in respect of which a proof could be tendered. In the present case the position is entirely different. There is the judgment debt, which is unquestionably a debt, and the only question which arises has regard to the conditions on which the petitioning creditor is entitled to rely on that debt. He can only rely on it, in my opinion, by at the same time conceding that the debtor has an equitable interest in the shares for which he is entitled to call if he tenders the purchase money.

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(1) 67 L. T. 465.

It is suggested that the court ought to exercise its discretion and allow an amendment of the petition in which the shares would be valued and the provisions of s. 4, sub-s. 2, complied with. It is true that in a case of inadvertence or of some reasonable excuse, the court has jurisdiction to allow an amendment to enable the sub-section to be complied with, but I do not think we ought to allow an amendment in this case. There was no inadvertence here, and no mistake of fact. On the other hand, there has been a deliberate attempt by the petitioning creditor throughout to maintain the position that he holds no security and is entitled to disregard the shares. I do not suggest that there has been any bad faith about that. He held, no doubt, a genuine belief that that was the legal position, but, in view of what I consider to be a very unfair attitude, I do not think we ought to allow an amendment. In the result, therefore, the appeal is allowed, the receiving order is rescinded, and, I apprehend, the petition dismissed.

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MACKINNON L.J. I agree.

GODDARD L.J. I agree.

Appeal allowed.

Solicitors: *Cronin & Son; Simmons & Simmons.*

H. C. G.

SIMONDS J.
1943
May 18.

W. DENNIS AND SONS, LIMITED *v.* WEST NORFOLK FARMERS' MANURE AND CHEMICAL CO-OPERATIVE COMPANY, LIMITED.

Discovery—Privilege—Company—Action by Shareholders—Interpretation of article—Accountants' report to company on effect of article—Receipt after issue of summons.

A report obtained by a company from chartered accountants on the interpretation of one of the articles of association of the company involving the duty of the directors in administering the affairs of the company is a report obtained on behalf of all the shareholders and is not privileged if ordered before, even if received after, the commencement of legal proceedings by certain shareholders against the company to determine a dispute on the construction of the article.

PROCEDURE summons.

The summons was taken out by the plaintiffs, W. Dennis and Sons, Ld., asking for an order for the production of a report of a firm of chartered accountants made for the defendants, the West Norfolk Farmers' Manure and Chemical Co-operative Co., Ld., before action brought. In their affidavit of documents the defendants admitted that they were in possession of the document, but they objected to produce it, on the ground that it was privileged from discovery.

The defendants carried on business as a co-operative society, and when profits permitted they made rebates to their customers from the payments made by the customers for their purchases during each trading year. Article 7A of the defendants' articles of association provided the method by which these rebates were to be ascertained. The plaintiffs were shareholders in, and customers of, the defendants, and F. W.

Dennis, the plaintiffs' chairman, was at all material times a director of the defendants. In 1937 disputes arose between Dennis and other directors of the defendants as to the method of calculation of the profits and rebates under art. 7A. On January 7, 1938, the company instructed a firm of chartered accountants to make a report to them on the construction, and the effect on the finances of the company, of art. 7A. The report was made, and it was sent to the company on February 5, 1938. In the meantime, on February 3, the plaintiffs took out an originating summons to determine questions of construction arising on art. 7A, the defendants and certain of their directors being made defendants to the summons. On March 21, 1939, Bennett J. upheld the plaintiffs' contentions and an order was made on the summons. In June, 1939, the plaintiffs began the present action against the defendants, alleging that for a period of years they had wrongfully claimed to deduct income tax and sums in respect of reserves before ascertaining the excess profits referred to in art. 7A, and, in May, 1939, had purported to pass a special resolution substituting a new article for art. 7A, which resolution was ultra vires the company, and alternatively a fraud on the rights of the plaintiffs. The plaintiffs claimed a declaration, an injunction restraining the defendants from acting on the resolution, and an account. The defendants denied liability.

Winterbotham (for *Gerald Upjohn*, on war service) for the plaintiffs. No such privilege as is claimed exists for any document other than one which is brought into existence for the purposes of an action. Privilege only obtains if litigation is pending, and when the defendants instructed the accountants to prepare this report no proceedings of any kind were pending or had even been contemplated. The fact that a summons was taken out to determine the construction of art. 7A two days before the report reached the company makes no difference, for those proceedings were friendly, not hostile: see Annual Practice, 1943, pp. 521 et seq. The general rule as to discovery is laid down in *Anderson* v. *Bank of Columbia* (1): see also *Jones* v. *Great Central Ry.* (2). Even if any privilege could otherwise be claimed for the report, it cannot be asserted against the plaintiffs, because they are shareholders in the defendant company and as such entitled to the benefit of

(1) (1876) 2 Ch. D. 644, 648, 658.

(2) [1910] A. C. 4.

any document obtained at their expense for the information and advice of the company: see Annual Practice, 1943, pp. 518, 519.

J. A. Reid (for *P. J. Sykes*, on war service) for the defendants. This is a report on a technical question of accountancy received by the defendants after proceedings against them had been begun, and it is, therefore, privileged from discovery. The document must be regarded, for the purposes of privilege, as on the date when it comes into existence. At that date the originating summons had been issued, and no distinction can be drawn between hostile and friendly proceedings. The parties were the same, and similar matters were in dispute as when the present action was begun. [*Southwark & Vauxhall Water Co.* v. *Quick* (1); *Jones* v. *Great Central Ry.* (2); *Birmingham & Midland Motor Omnibus Co.* v. *L. & N.W. Ry.* (3) were cited.]

Winterbotham replied.

SIMONDS J. Two points have been raised, first, whether, having regard to the circumstances in which, and the date on which, the accountants' report was made, it is a privileged document, and, secondly, whether, even if it were otherwise a privileged document, it is privileged having regard to the fact that the plaintiffs are themselves shareholders in the defendant company.

I have formed a clear opinion on the second point which disposes of the case. The general rule, which applies equally as between a company and its shareholders and as between a trustee and his beneficiaries is thus stated at pp. 518 and 519 of the Annual Practice, 1943: "A cestui que trust . . . . is "entitled to see cases and opinions submitted and taken by "the trustee for the purpose of the administration of the "trust; but where stated and taken by the trustees not for "that purpose, but for the purpose of their own defence in "litigation against themselves by the cestui que trust they "are protected . . . . On the same principle a ratepayer would "be entitled to see cases and opinions taken by the corporation "on the subject of rates . . . . and so in *Gouraud* v. *Edison Gower* "*Bell Telephone Co., Ld.* (4), an action by shareholders against "the company, the plaintiffs were held entitled to see communi"cations between the company and their solicitors: but similarly

(1) (1878) 3 Q. B. D. 315.
(2) [1910] A. C. 4.
(3) [1913] 3 K. B. 850, 856.
(4) (1888) 57 L.J. (Ch.) 498.

"a shareholder could not see counsel's opinion taken by the "company, in respect of the matter in dispute between them." In the present case it seems clear that when, in January, 1938, the defendants instructed the accountants to make a report on the interpretation of the article, and, therefore, on the duty of the directors in administering the affairs of the company, they were doing something on behalf of all the shareholders. They were seeking to do no more than to perform their duty having regard to the difference of opinion which had arisen on the board, and they did not seek the report because some action was threatened against them. That being so, the plaintiffs, as shareholders, are entitled to see what the accountants reported regarding the rights and duties of the board.

That was the position when the report was commanded. Two days before it was made the plaintiffs instituted proceedings by way of originating summons so that the construction of the article and their rights under it might be determined. The present defendants were necessarily made defendants in those proceedings. It appears to me that the plaintiffs, by instituting those proceedings two days before the report was received, did not lose their right as shareholders to see that which they otherwise would have been entitled to. In other words, the report was not a document obtained by the defendants for the purpose of defending themselves against hostile litigation, and it is only where a document is obtained by a company for that purpose that privilege can be claimed. It must never be forgotten that the rules as to privilege are strict, and, as has so often been said, privilege is not to be extended.

That really disposes of this case, for, if there was no privilege then, no privilege has since been created in respect of the document. It may well be that, if it was once privileged, it remains privileged, but holding, as I do, that no privilege attached to the document in the old proceedings, no new privilege obtains in respect of it now. Having come to that conclusion, I need not express any opinion on what I regard as a much more difficult aspect of the case, namely, whether, if the plaintiffs had not stood in the relation in which they do stand to the defendants, the defendants might have claimed privilege in respect of this document having regard to the fact that it came into existence after the proceedings had been begun although those proceedings had not begun when it was commanded, and, for all I know, were not even in serious

SIMONDS J.
1943
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contemplation. I find, therefore, against the defendants on their claim for privilege, and direct that the document shall be open to the inspection of the plaintiffs accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Clifford-Turner & Co.*

H. L. L.

SIMONDS J.
1943
Apr. 13, 14;

In re CABORNE.

HODGE AND NABARRO *v.* SMITH AND OTHERS.

Will—Bequest—Validity—Public policy—Gift to son absolutely—Modification of gift "if his present wife be alive and married to "him"—Absolute gift to take effect "if his said wife shall die or "his said marriage be otherwise terminated."

A testatrix by her will provided (inter alia): "I give . . . . "all the . . . . residue . . . . of my . . . . property . . . . unto "my son absolutely provided that if his present wife shall still be "alive and married to him the absolute gift to him next herein-"before contained shall be modified in such manner that he shall "have an interest for his life only or for such part thereof as his "present wife . . . . shall remain his wife in the articles set out "in the schedule hereto but so that if at any time during the life "of my said son his said wife shall die or his said marriage be "otherwise terminated the absolute gift hereinbefore contained "shall take effect as and from such event but if my said son shall "die leaving his said wife alive I bequeath each article to the "respective legatee whose name appears opposite and as to the "remainder of my said residuary estate I give devise and bequeath "(*sic*) on the death of my said son if he shall predecease his said "wife being then still married to her unto my trustees upon "trust" as therein mentioned:—

Held, that the provision was designed, or tended, to encourage an invasion of the sanctity of the marriage bond, and was, therefore, void as being against public policy.

Dictum of Turner L.J. in *Hope* v. *Hope* (1857) 8 D. M. & G. 731, 744, applied.

ADJOURNED summons.

By her will, dated April 13, 1935, the testatrix, Mary Lilian Caborne, after making specific bequests of certain chattels provided (inter alia): "I give . . . . all the . . . . residue . . . . of "my . . . . property . . . . unto my son absolutely provided "that if his present wife shall still be alive and married to him "the absolute gift to him next hereinbefore contained shall be "modified in such manner that he shall have an interest for "his life only or for such part thereof as his present wife, "Gertrude Maria Julia Caborne shall remain his wife in the "articles set out in the schedule hereto but so that if at any "time during the life of my said son his said wife shall die "or his said marriage be otherwise terminated the absolute "gift hereinbefore contained shall take effect as and from such "event but if my said son shall die leaving his said wife alive "I bequeath each article to the respective legatee whose "name appears opposite and as to the remainder of my said "residuary estate I give devise and bequeath on the death of "my said son if he shall predecease his said wife being then "still married to her unto my trustees upon trust to apply "the income arising therefrom towards the maintenance, "education or advancement of my son's said wife's daughter, "Anne Micheline Mary Caborne, for the period of one year "after his decease and at the expiration of such year to sell "call in and convert the same into money and to divide the "proceeds of such sale calling in and conversion between the "following institutions in the following shares . . . ." The testatrix then named a number of charities. In the first column of the schedule to the will were a number of specific articles, and, in the second, the names of the legatees. In September, 1935, Warren Roger Caborne, the son, separated from his wife. On September 19, 1937, the testatrix died. On April 3, 1941, the son died. By this summons, the plaintiffs, his personal representatives, who claimed that his estate was absolutely entitled to the residue of the testatrix, asked (inter alia) whether the proviso in her will was void.

Roxburgh K.C. and *Lindner* (*Pascoe Hayward* with them) for the plaintiffs. The proviso is a condition subsequent tending to invade the sanctity of the marriage bond and is, therefore, void as against public policy: *Tennant* v. *Braie* (1). Even a condition that spouses shall live apart is void, and, this case is clearly a fortiori, the only conceivable explanation of the condition being the deliberate desire of the testatrix to disturb the marital relationship between her son and his wife and to prevent her son from using her residue to support either his wife or his child. In *In re Freedman* (1), the testator directed that, if and when his daughter should become a widow or be legally separated or divorced from her husband, his trustees should make payments to her during the widowhood, separation, or divorce, and Farwell J. held both the condition and the gift to be void as against public policy. In *In re Thompson* (2), there was a provision entitling the testator's daughter to the whole of the income of the estate "if at any time after the testator's decease she should be the "widow of her present husband or married to someone other "than her present husband, or divorced from but not "subsequently remarried to her present husband," and Bennett J. held that the provision was not contrary to public policy, taking the view that the intention of the testator was a matter of evidence. That is, however, inconsistent with the view of the House of Lords in *Fender* v. *St. John-Mildmay* (3). To treat the matter as one of evidence is wrong on the authorities: *Mitchel* v. *Reynolds* (4). The proviso in the present case encourages the husband "to omit the "doing of something that is a duty" within the meaning of those words as used in *Mitchel* v. *Reynolds* (4), for the duty of a husband is to maintain the married life where it is possible to do so: *Cartwright* v. *Cartwright* per Knight Bruce L.J. and Turner L.J. (5). The vice of the present proviso is made worse by the facts that the date of the will preceded the outbreak of trouble between the parties and that the proviso took effect in the light of that trouble. In *Marlborough* (*Duchess*) v. *Marlborough* (*Duke*) (6), a re-settlement gave to a tenant for life power "to appoint to any woman whom he may "marry" a jointure rent charge and it was declared that the power might be exercised as often as the donee should marry. That was held not to be contrary to public policy, but the present proviso is quite different. It is a clear example of a provision affording a motive for improper action to which it is likely that those concerned will yield: *Fender* v. *St. John-Mildmay*, per Lord Atkin (7): see also *In re Moore* (8), in which a gift of weekly payments was held to be

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(1) (1612) Tothill (1820 ed.), 78.

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(1) Unrep. Dec. 2, 1942.
(2) [1939] 1 All E. R. 681.
(3) [1938] A. C. 1.
(4) (1711) 1 P. Wms. 181, 189.
(5) (1853) 3 D. M. & G. 982, 988, 989, 990, 991.
(6) [1901] 1 Ch. 165.
(7) [1938] A. C. 1, 13.
(8) (1888) 39 Ch. D. 116.

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void because they were to be made during a period the commencement and duration of which were fixed in a way not allowed by law. *Wacker* v. *Bullock* (1), ought not to be followed.

B. S. Tatham for the trustees of the will.

J. A. Reid for residuary legatees. The gift does not contain such a clear temptation to the son to commit an act contrary to public policy as to vitiate the proviso. It was said many years ago that public policy was "an unruly horse" and that the scope of the doctrine must not be extended, but only where there is a clear inducement to do something against public policy will a document be upset: *In re Hope Johnstone* (2). Here, the words of the will do not do that.

W. F. Waite for another residuary legatee. An important consideration is that, when the will became effective, the husband and wife were not living together: *Cartwright* v. *Cartwright* (3), per Turner L.J. Public policy is "an unruly "horse" only in so far as it must be kept in hand and governed. Its position is quite clear in the present case. The proviso amounts to: "If you divorce your wife, the property will "come to you. If you don't, it won't," and that does not provide a husband who has already separated from his wife with an additional motive for obtaining a divorce from her. The doctrine of public policy cannot apply where a husband and wife are living apart: *Fender* v. *St. John-Mildmay* (4). The relevant date on this point is that of the death of the testatrix, when the will came into operation, and at that date the spouses had been separated for two years. Nor can it be said that the proviso caused their separation, for there is no evidence that the son knew of the contents of the will before the death of the testatrix. A separation agreement strikes more deeply at the root of the marital relationship than does this proviso, yet a separation agreement has never been held to be void as against public policy. It has sufficient merit to enable the parties suing on it to invoke the remedies of the Chancery Division: *Wilson* v. *Wilson* (5); *In re Lovell* (6); *In re Moore* (7).

Coen for other residuary legatees.

Roxburgh K.C. replied.

Cur. adv. vult.

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(1) [1935] New Zealand L. R. 828.
(2) [1904] 1 Ch. 470.
(3) 3 D. M. & G. 982, 991, 992.
(4) [1938] A. C. 1.
(5) (1848) 1 H. L. C. 538.
(6) [1920] 1 Ch. 122.
(7) 39 Ch. D. 116.

1943. May 19. SIMONDS J. read the following judgment. The proviso as a whole is complicated and tortuous, but, so far as the residue, other than the scheduled articles, is concerned, the part of it that is relevant to the event that happened, namely, the son's predeceasing his wife being then still married to her, is simple enough. Its plain meaning and effect was conceded by counsel to be in the nature of a condition subsequent cutting down the absolute gift to the son if he predeceased his wife and their marriage had not, in the meantime, been dissolved. The contention, on the one hand, being that such a condition is against public policy, and, therefore, void, I received, on the other hand, the usual warning against the court attempting to define the policy of the law, but I do not think that I set up any new head of public policy, or urge that "unruly horse" from its measured gait, if I re-assert the sanctity of the marriage bond and with it the importance of maintaining the integrity of family life, and, therefore, denounce and declare void a provision which is designed or tends to encourage an invasion of that sanctity.

It is sufficient if I take one out of many pronouncements on this subject. I take *Hope* v. *Hope* (1), the passage I cite being from the judgment of Turner L.J.: "There is "nothing which the courts of this country have watched "with more anxious jealousy, and I will venture to say, "with more reasonable jealousy, than contracts which have "for their object the disturbance of the marital relations. "The peace of families—the welfare of children, depends, to "an extent almost immeasurable, upon the undisturbed "continuance of those relations; and so strong is the policy "of our law upon this subject, that not only is marriage "indissoluble, except by the legislature, but divorces à mensâ "et thoro are granted only in cases of cruelty or adultery. "But what is this article of the agreement? That the wife "shall not oppose the husband's suit for a divorce, but, on "the contrary, shall facilitate the obtaining it. I can "conceive nothing more contrary to the policy of our law "than this provision of the agreement." I need read no more. Against this conclusion two arguments have been urged—first, that, since the legislature has thought fit to provide the remedy of divorce, it cannot be against the policy of the law that a husband or wife should pursue it, and, secondly, that,

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(1) (1857) 8 D. M. & G. 731, 744.

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whether that general proposition be sound or unsound, it is not against the policy of the law where the spouses are in fact separated, to make provision for future divorce. The first argument is, in my judgment, fallacious. The law provides the remedy of divorce for an injured spouse who can allege and prove one or other of the statutory grounds of divorce. A divorce a vinculo, which could formerly be granted only by a special Act of Parliament, may now be granted by the High Court under the jurisdiction conferred by general Acts, but it then was and now is a remedy granted in default of a better cure. Whether the matter be looked at from its religious or civil aspect, the positive duty of reconciliation and the danger of a provision which tends to encourage a departure from that difficult path are equally obvious. How often must any judge in this Division, exercising the familiar jurisdiction over infants, have felt a profound conviction that the welfare of his wards and the interest of society as a whole could best be served by a reconciliation of the parents, and, perhaps, deplored the readiness with which the one or other, or too often both of them, embraced the opportunity of statutory relief. An inducement to that step by the promise of material advantage must, in my judgment, be utterly invalid. It was urged that the proviso here should be narrowly construed as an encouragement to the husband to avail himself of some existing matrimonial offence on the part of his wife. I doubt whether I should be justified in so construing it. I think that it is of wider import, and can fairly be read as a direct encouragement, either himself to commit those acts which would enable his wife to proceed against him, or to take advantage of his wife's offences: see *Cocksedge* v. *Cocksedge* (1); but, whether the narrower or wider construction be adopted I am, for the reasons above stated, clearly of opinion that the condition is void.

The second contention is founded on the fact that when the will became operative, at the death of the testatrix, the son and his wife were, in fact, separated by agreement. It is said that, in such a case, provision can validly be made, either by the spouses or by a third party, for a future divorce. I dissent from this proposition. It has long been established, although not without formidable opposition, that, where husband and wife are in fact separated or have determined on an immediate separation, provision may validly

(1) (1844) 14 Sim. 244.

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be made for that state of affairs, but it is not, in my judgment, a legitimate inference from this that provision can, therefore, be made for divorce. About separation there is nothing final. It may, and not seldom does, lead to reunion, but to make provision for divorce is, as much for parties who are separated as for those who are living together, an invitation to matrimonial offence, or, at the least, its result may be to bar reconciliation and make irremediable a breach for which time and goodwill might have found a cure. As Turner L.J. said in *Hope* v. *Hope* (1): " . . . . there are consequences "which attach to a sentence of divorce which do not belong "to a separation by agreement merely." No valid argument then can, in my judgment, be founded on the fact that in this case, the spouses were already separated when the will became operative.

Cases in which provision for divorce, as distinct from provision for separation, has been discussed, are few. *Tennant* v. *Braie* (2), is reported in these few words: "a . . . . "devise made to the daughter to pay her a sum of money if she "will be divorced from her husband, the gift made good, though "the condition void." This is early, and clear, authority for the invalidity of such a condition. It may well be that the only matter of doubt arose on the form of the devise, that is, whether it was a limitation or a condition. The diligence of counsel did not discover any case in which a similar provision was considered, until *Hope* v. *Hope* (1), which I have already cited. Again, there is a long gap before I come to *In re Thompson* (3), a decision of Bennett J. In that case, the will contained a clause to the effect that the testator's daughter, if still married to her husband, should be entitled to no more than an annuity of 300*l.*, and further provided that she should be entitled to the income of the whole estate if at any time after the testator's decease, she should be the widow of her present husband or married to someone other than her present husband, or divorced from, but not subsequently married to, her present husband. Bennett J. held that this provision was not contrary to public policy. It does not appear that any authority was cited to him except *In re Moore* (4), and, in coming to a conclusion in favour of the validity of the provision, the learned judge founded on evidence dehors the will, which he held to be admissible, to the effect that the testator disliked his son-in-law intensely, and on this held that the purpose of the provision was, not to induce a future separation between husband and wife, but to make sure that the income from the estate in excess of 300*l.* should not get into the hands of a man whom the testator regarded as a spendthrift. He, therefore, felt at liberty to determine that there was nothing contrary to public policy in the disposition under review. With great deference to the learned judge, I feel some doubt whether the decision observes the rule that in these matters the law looks, not to the possibility of public mischief occurring in the particular instance, but to the general tendency of the disposition, but, however that may be, I must regard the case as one depending on its own particular facts for which there is no parallel in the case now before me. In *In re Freedman* (1) Farwell J., as appears from the order made by him, had to consider the validity of a bequest of a weekly sum to a woman during the period of her widowhood or legal separation or divorce from her husband, and held that such a bequest was wholly void. He appears to have treated the case as too plain for argument, or, at any rate, for a reasoned judgment. I have not been told whether, in that case, the spouses were in fact separated. I was also referred to a decision of the Supreme Court of New Zealand, *Wacker* v. *Bullock* (2), in which it was held by Northcroft J. that a testamentary provision made by a mother for her daughter on the contingency of the latter either divorcing her husband or being divorced by him was not against public policy and void. The learned judge, after citing some observations of Salmond J. in *Mason* v. *Mason* (3), says: "It is true that these words had special application to a "question of jurisdiction in divorce in relation to public policy. "If it be not against public policy to grant a decree of divorce "in certain circumstances to an errant husband, then I do "not consider I should hold against a provision made by a "mother for her daughter upon the contingency of the latter "either divorcing her husband or being divorced by him. "A prudent parent may well make such financial provision "for a daughter in respect of whom a divorce is neither desired "nor expected." With deference to the learned judge I cannot subscribe to this view. Husband and wife may agree to separate. That agreement is valid at law, yet a provision

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(1) 8 D. M. & G. 731, 746.

(2) Tothill (1820 ed.), 78.

(3) [1939] 1 All E. R. 681.

(4) 39 Ch. D. 116.

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(1) Unrep. Dec. 2, 1942.

(2) [1935] New Zealand L. R. 828.

(3) [1921] New Zealand L. R. 955.

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in anticipation of such an agreement is invalid. So, a husband or wife may lawfully petition for divorce, yet a provision for the contingency of future divorce may be, and as I hold, is, invalid. Finally, I must refer to *Fender* v. *St. John-Mildmay* (1), since counsel on both sides relied on certain passages in the speeches of the learned lords who heard that case. One point only was there decided, namely, that a promise of marriage made by a husband or wife after decree nisi and before decree absolute does not offend against public policy and that the breach of it may found an action for damages. No doubt was cast, nor could it be, in view of previous decisions of the House, on the broad principle of public policy to which I referred at the opening of this judgment, and it would, in my opinion, be wrong to find in isolated passages, particularly in the speech of Lord Wright, any support for the suggestion that the duty of reconciliation is less urgent, or any provision tending to lead husband or wife from that path less vicious, than it has so often been proclaimed to be.

I conclude, then, that the condition attaching to the absolute gift in favour of W. R. Caborne is invalid, and I so declare. It was argued on behalf of the specific legatees of the scheduled articles that a different result might be reached in their case, on the ground that, on the true construction of the will, there was not a gift over on condition, but a series of limitations. This contention is not, in my judgment, well founded. I must read the clause as a whole, and, so read, it appears to me to be clearly an absolute gift to W. R. Caborne of residue including the articles in question, followed by a proviso which is in the nature of a condition. I must, therefore, declare that, in regard to these articles also, the gift over is invalid and that they belong to W. R. Caborne absolutely. I will declare that the proviso is absolutely void.

Solicitors: *J. N. Nabarro & Sons; Crossman, Block & Co., for Reed, Wayman & Hyner, Downham Market; Gresham, Davies & Dallas; Wilde, Sapte & Co.; M. A. Jacobs & Sons.*

(1) [1938] A. C. 1.

K. R. A. H.

In re ANGLO-INTERNATIONAL BANK, LIMITED.

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May 4, 17; June 3.

Company—Reduction of capital—Special resolution—Validity—No service on shareholders in enemy or enemy-occupied countries—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 117, *sub-s.* 2—*Trading with the Enemy Act,* 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 1, *sub-s.* 2 (*a*) (*iii.*) ; *s.* 2, *sub-s.* 1 (*b*) ; *s.* 15, *sub-s.* 1.

Shareholders in a company who had registered addresses in enemy or enemy-occupied countries, the enemy-occupied countries being Poland, Czecho-Slovakia, Yugoslavia, Holland, Belgium, Greece, France, Monaco, and the Channel Isles, were not served, either personally or by post, as required by the company's articles of association, with notices of an extraordinary general meeting at which was passed a special resolution for the reduction of the capital of the company :—

Held, that, while it would not be safe to hold that all the shareholders who were resident in the enemy-occupied countries were to be regarded as enemies at common law, they were "enemies" within s. 2, sub-s. 1 (*a*), of the Trading with the Enemy Act, 1939, so that the company would have committed an offence under s. 1, sub-s. 2 (*a*) (iii.) of the Act if it had had, or had attempted to have, any communication with those shareholders ; that that was equivalent to a suspension of their right to receive notice of meetings of the company ; and, that, therefore the resolution was validly passed.

The degree of occupation by the enemy required at common law to render territory enemy-occupied territory as laid down in *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)* [1943] A. C. 203 discussed.

APPEAL from Bennett J.

The Anglo-International Bank, Ld., was incorporated under the Companies Acts in 1926 with a capital of 2,000,000*l.* divided into 2,000,000 shares of 1*l.* each, of which 1,960,008 had been issued and paid up or credited as paid up. The company's articles of association provided that the company might in general meeting increase its capital by such sum divided into shares of such amount as the resolution should prescribe, and that the company might by special resolution reduce its capital in any manner authorized by law. At an extraordinary general meeting held on February 24, 1943, a special resolution was passed reducing the capital of the company to 1,509,998*l.* divided into 1,960,008 shares of 15*s.* each and 39,992 shares of 1*l.* each by repayment to the shareholders of 5*s.* a share, and thereafter increasing the capital to its former amount of 2,000,000*l.* by the issue of

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490,002 new shares of 1*l.* each. At this meeting seven shareholders were present in person holding together 17,189 shares and 395 shareholders were present by proxy holding together 1,802,406 shares and the special resolution was carried unanimously. Ninety-nine shareholders holding 46,552 shares, whose registered addresses were in enemy countries, or in enemy-occupied countries, namely, Poland, Czecho-Slovakia, Yugoslavia, Holland, Belgium, Greece, France, Monaco and the Channel Isles, had not been served with notices of the meeting in manner provided by the articles of association. The articles provided (art. 55) that: "seven days' notice at "the least . . . . specifying the place, the day and the hour "of the meeting, and in case of special business, the general "notice of such business shall be given to the members in "manner hereinafter mentioned . . . ."; (art. 140) that: "any notice or document may be served on any member "either personally or by sending it through the post in a "prepaid envelope . . . . addressed to such member at his "registered address . . . ."; and (art. 141) that: "any "notice or other document, if served by post, shall be deemed "to have been served at the time when the letter containing "the same is put into the post office . . . ." As will be seen from the figures already given, if all the shareholders with registered addresses in enemy or enemy-occupied countries had been able to vote against the passing of the resolution it would have had no effect. On the company's petition for the confirmation of the proposed reduction of capital by the court, the question arose whether the special resolution for the reduction of capital had been properly passed. Bennett J. held that, as no notice of the meeting had been given to the ninety-nine shareholders, the special resolution had not, in view of s. 117, sub-s. 2, of the Companies Act, 1929 (1), been duly passed. The company appealed.

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(1) By Companies Act, 1929, s. 117: "(1.) A resolution shall "be an extraordinary resolution "when it has been passed by a "majority of not less than three-"fourths of such members as, "being entitled so to do, vote in "person or, when proxies are "allowed, by proxy, at a general "meeting of which notice speci-"fying the intention to propose "the resolution as an extra-"ordinary resolution has been "duly given." "(2.) A resolution "shall be a special resolution "when it has been passed by such "a majority as is required for the "passing of an extraordinary reso-"lution and at a general meeting "of which not less than twenty-"one days' notice, specifying the "intention to propose the reso-"lution as a special resolution, "has been duly given."

Christie K.C. and *C. W. Turner* for the company. The special resolution was duly passed and Bennett J. ought to have confirmed the proposed reduction of capital. The Companies Act, 1929, s. 117, sub-s. 2, requires that for the purpose of a special resolution not less than twenty-one days' notice of the meeting must be "duly given" to the shareholders. Whether a notice is duly given turns on the articles of association (see s. 115) and art. 140 requires that a notice be served personally or by sending it through the post addressed to the member at his registered address. That could not be done in the case of the shareholders with registered addresses in enemy or enemy-occupied countries, but all these persons are to be regarded as enemies at common law, and, as such, they are deprived of the right to notices and the company is relieved of the obligation to give them. Persons in enemy-occupied countries are in the position of alien enemies at common law just as much as those in enemy countries: *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)* (1). At common law a contract with an enemy is suspended and to that extent the contract with the shareholders contained in the articles of association is varied: see *Furtado* v. *Rogers* (2); *Brandon* v. *Curling* (3). Alternatively, the company can have no dealing with the shareholders with registered addresses in enemy-occupied countries under the Trading with the Enemy Act, 1939. Sect. 1 of the Act (4) makes it an offence to trade with an enemy, defined in s. 2, sub-s. 1, as meaning "any individual resident in enemy territory." Enemy territory is defined in s. 15, sub-s. 1, as "any area which is "under the sovereignty of or in the occupation of a Power "with whom His Majesty is at War . . . ." Any attempt to communicate with a person in enemy territory is made an offence by the Defence (General) Regulations, 1939, reg. 4A: see also Defence (Trading with the Enemy) Regulations, 1940, (St. R. & O., 1940, No. 1092), para. 2 (5.). It is true that a licence to communicate with such a person can in some cases be obtained from the Board of Trade, but, once it had been made an offence so to communicate, the company could not be required to apply for a licence. Even if a licence had been obtained, the shareholders could not have voted. The rights of the enemy shareholders are suspended for the duration of the war, and the articles of association are to be read as varied by eliminating from them for the period of the war any provision entitling enemy shareholders to receive notices of meetings. It follows that the company can conduct all ordinary business without serving notices of meetings on these shareholders: *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1); *Robson* v. *Premier Oil and Pipe Line Co.* (2).

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(1) [1943] A. C. 203.

(2) (1802) 3 Bos. & P. 191.

(3) (1803) 4 East. 410, 416.

(4) By Trading with the Enemy Act, 1939, s. 1, sub-s. 1: "Any "person who trades with the "enemy within the meaning of "the Act shall be guilty of an "offence of trading with the "enemy . . . ." Sub-s. 2: "For "the purposes of this Act a person "shall be deemed to have traded "with the enemy—(*a*) if he has "had any commercial, financial "or other intercourse or dealings "with, or for the benefit of, an "enemy, and, in particular . . . . "if he has— . . . . (iii.) performed "any obligation to . . . . an enemy, "whether the obligation was under-"taken before or after the com-"mencement of this Act; . . . ."

By s. 2, sub-s. 1: "Subject to "the provisions of this section, "the expression 'enemy' for the "purposes of this Act means— " . . . . (*b*) any individual "resident in enemy territory, " . . . ."

By s. 15, sub-s. 1: "In this "Act the following expressions "have the meanings hereby "respectively assigned to them :— " . . . . 'enemy territory' means "any area which is under the "sovereignty of, or in the occu-"pation of, a Power with whom "His Majesty is at War . . . ."

Cur. adv. vult.

1943. June 1. LORD GREENE M.R. read the judgment of the court (LORD GREENE M.R., LUXMOORE and GODDARD L.JJ.). This appeal arises out of the refusal by Bennett J. to confirm a reduction of capital which the company claims was duly effected, subject to confirmation by the court, by special resolution. Apart from the question of the validity of the special resolution, Bennett J. was prepared to sanction the reduction, which was by way of return of capital, and approved a form of minute. The only question which we have to consider is whether or not he was right in holding that the resolution was not duly passed.

This question is one of general importance. In the present case we were told that it has a special importance since, if it was necessary to send notices of meetings to these shareholders, the result would be to invalidate earlier resolutions of the company, and one consequence of this would be that the company would not now have a properly elected board of directors. At the conclusion of the argument we intimated that the appeal would be allowed, but that, in view of the importance of the case, we would give our reasons in writing.

(1) [1916] 2 A. C. 307, 325, 330. (2) [1915] 2 Ch. 124.

This we now proceed to do. As there was no respondent to the petition or to the notice of appeal neither the learned judge nor this court had the advantage of hearing argument from anyone concerned to attack the validity of the resolution. The judgment of Bennett J. does not deal with the matters which were discussed before this court.

Sect. 117, sub-s. 1, of the Companies Act, 1929, requires for the effective passing of an extraordinary resolution that notice of the meeting shall be "duly given." Sub-sect. 2 defines a special resolution as one passed by the majority required for an extraordinary resolution at a general meeting "of which not less than twenty-one days' notice . . . . has "been duly given." The meaning of the words "duly given" is to be ascertained by reference to s. 115 which contains provisions as to notices which are to have effect "so far as "the articles of the company do not make other provision in "that behalf." In the present case the articles do make other provision, and, accordingly, it is to them that we must turn to find what the rights of the shareholders and the duties of the company are with regard to notices of meetings. Article 55 prescribes that notices of meetings in the form there specified "shall be given to the members in manner "hereinafter mentioned," and art. 140 provides that a notice may be served either personally or by sending it through the post addressed to the member at his registered address. The position, therefore, is that the right of a member to receive a notice and the obligation of the company to serve it are determined by the contract the terms of which are to be found in the articles. The shareholders are entitled to have and the company is bound to give exactly what the articles require, no more and no less. In the case of this company, all that a shareholder can require is (at the option of the company) either personal service or service by posting to his registered address. No other means of service are provided.

It cannot, we think, be disputed that, if the right of a shareholder to receive the contractual notice is abrogated or suspended by operation of law—or, putting it another way, if the performance of the company's obligation to serve the contractual notice on him becomes illegal—the shareholder, during the period of abrogation, suspension or illegality, must be treated as having lost his contractual right to receive notice. The effect of this must be that the articles must be treated as though they had expressly denied to that shareholder

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the right to receive notices so that a meeting could be regularly called without him. The question in this case is whether or not all the ninety-nine shareholders had lost their right to receive the notice of the meeting by reason of the fact that their registered addresses were in enemy or enemy-occupied territory.

It cannot, we think, be suggested that for present purposes the status of these shareholders is to be treated otherwise than on the basis that they were at the relevant time resident at the addresses appearing in the company's register of members. These addresses are the only places where, according to the contract, notices sent by post can effectively be served. For the purposes of the contract they have elected to have what in some ways resembles a "commercial domicil" in the countries in which the addresses are situated. It is to them direct or through agents at those addresses that the notices are to be sent, and the circumstance that a particular shareholder may, in fact, have been resident elsewhere, e.g., in a neutral country, seems to us irrelevant.

On behalf of the company it was argued that the right of these shareholders to receive notices and the obligation of the company to send them were suspended both at common law and under the Trading with the Enemy Act, and that, if the company had attempted to despatch the notices it would have been committing an illegal act. Consequently, it was said that, as no legal right in the shareholders to receive, and no legal obligation on the company to send, notices existed at the relevant time, the omission to send the notices did not in law invalidate the proceedings at the meeting.

The argument based on common law and that based on the Act require separate treatment. We will deal first with the common law position. The shareholders whose registered addresses are in enemy territory must for present purposes be regarded as alien enemies, whatever their nationality: *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* (1). So long as they retain the character of alien enemies their right of voting is suspended: *Robson* v. *Premier Oil & Pipe Line Co.* (2). They cannot appoint a proxy, and any proxy previously given, like any other mandate of agency, will have ceased to be valid: see the *Sovfracht* case per Lord Porter (3). It follows, therefore,

(1) [1943] A. C. 203, 209.
(2) [1915] 2 Ch. 124.
(3) [1943] A. C. 254.

that, even if notice of the meeting had in fact been given to these shareholders, they could not have voted at the meeting. But the matter does not rest there. The suspension of the rights of an alien enemy shareholder cannot, in our opinion, be limited to his right of voting. It must extend to the ancillary right conferred by the contract under which he holds his shares to receive notices of meetings of the company. That right is a right in relation to property in this country, namely, the shares, and is, in our opinion, suspended just as much as the right to vote: see per Sargant J. in *Robson* v. *Premier Oil & Pipe Line Co.* (1). If the matter be looked at from the point of view of the company the same result follows. Quite apart from the suspension of the shareholder's contractual right to receive notices, the company, in our opinion, could not lawfully communicate or attempt to communicate with shareholders who at the time were enemy aliens. In *Robson's* case (2) Pickford L.J. in delivering the judgment of this court said (3): "All intercourse which could tend to "such detriment [to this country] or advantage [to the "enemy] whether commercial or not is . . . . inconsistent "with the state of war between the two countries and therefore "forbidden." It is true that in that case the transaction in respect of which it was claimed that the enemy shareholder could exercise his voting rights was one which unquestionably would have harmed this country and benefited the enemy, but we do not think that it is necessary to examine closely the facts of a particular transaction. In the circumstances of war as it is waged to-day, it seems to us impossible to say that any communication with an enemy alien may not tend to the detriment of this country or the advantage of the enemy, and the only safe rule to adopt is that all communications are forbidden. All communications "across the line of war" are prohibited: per Lord Wright in the *Sovfracht* case (4).

If all the ninety-nine shareholders had had their registered addresses in enemy territory they would, in our opinion, for the reasons which we have given, have suffered suspension of their right to receive notices of meetings. The special resolution would not have been invalidated by the omission to send notices to them, and this quite irrespective of the fact that the notices would for obvious reasons never have reached

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(1) [1915] 2 Ch. 131.
(2) Ibid. 124.
(3) Ibid. 136.
(4) [1943] A. C. 203, 217.

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them in time, if at all. A large number, however, had their registered addresses, not in enemy territory, but in territories in enemy occupation, namely, Poland, Czecho-Slovakia, Yugoslavia, Holland, Belgium, Greece, France, Monaco and the Channel Isles. The question whether or not these shareholders are to be regarded as alien enemies at common law depends on the character of the occupation. In the case of Holland the question is settled by authority. Those shareholders are alien enemies: see the *Sovfracht* case (1). In the case of the other countries the position is not so clear, and the opinions in the *Sovfracht* case (1) require closer examination. The Lord Chancellor's conclusions were, as he said, "in "general accord" with those of Lord Wright and Lord Porter, with whose opinions Lord Atkin and Lord Thankerton agreed. We, therefore, turn first to those passages in the opinion of Lord Wright which define the nature of the occupation required to create the character of alien enemy. He says (2): "It might be better if the epithet applied were 'enemy-"'subjugated.' This would show that a mere temporary "occupation, for instance, by a military force in the conduct "of belligerent operations, is not enough. If the territory "is to be deemed enemy territory, it must be subjugated, not "merely occupied. It must be held under the dominion and "control of the enemy for a period sufficient to give the "occupation a settled and relatively permanent character "*and to show the intention to keep it.* I do not think that the "cases require that there should be formal acts, such as a "cession by treaty or a public declaration of annexation. "The matter must be decided as a question of fact with due "regard to the character, purpose and intention of the "occupation and the degree of dominion exercised. All "acquisitions in war may be temporary. They may be "abandoned on peace being declared, or surrendered or "retaken under the pressure of superior force, but there is a "sharp distinction between an occupation of territory by "armed forces for strategical and temporary purposes and an "occupation of territory as being *a settled acquisition.*" He states the opinion of Lord Stowell to have been (3) that "effective subjugation and firm possession *with the intention* "*of keeping the conquest*" are the test. Later, he applies the principles which he had enunciated to the case of

(1) [1943] A. C. 203, 217.
(2) Ibid. 219.
(3) Ibid. 222.

Holland (1). Speaking of the inhabitants he says: "They "are under the dominion and control of the Germans, who "exploit them, plunder them and tyrannize over them for the "benefit of the German Reich. *It is clear that the Germans "do not intend to relinquish their possession unless forced to "do so.*" The words which we have italicized in these passages would appear to indicate that an intention on the part of the enemy to keep the country which he has subjugated as part of his territorial possessions is an element which must be present. Such an intention was, Lord Wright says (1), one of the matters which before the House were treated as of "common notoriety." On what facts or information this treatment was based does not appear, but, if an intention of this character is a necessary element, we are not sure to what extent the court is entitled in a case like the present where there is no opposition to treat as notorious matters on which it has no information except what may be gathered from official publications and the public press. Thus, we do not see how we can assume that the enemy intends to "keep" France, or Belgium, or Greece, or the Channel Isles, in the sense of incorporating them permanently in his possessions. We cannot, however, think that the expression "keep" was intended by Lord Wright to be used in this sense. One object of the common law rule is to prevent advantage to the enemy. Such an advantage may accrue if the occupation is of a character which enables the enemy to deal with the inhabitants of the occupied country and their civil rights in such a way as to secure profit to himself, whatever his ultimate intentions as to the future of the occupied country may be. It is for this reason that a mere military occupation is insufficient to brand the inhabitants as alien enemies since such an occupation does not affect the civil rights of the inhabitants beyond what may be necessary for the purpose of conducting military operations. That we are right in construing the word "keep" as used by Lord Wright in a restricted sense is, we think, shown by a consideration of the opinions of the other members of the House. Thus, the Lord Chancellor says (2): "If, as a result of the occupation, the enemy is "provisionally in effective control of an area at the material "time and is exercising some kind of government or adminis-"tration over it, the area acquires 'enemy character'." Lord Atkin says (3): "When a British court has to consider what is

(1) [1943] A. C. 203, 229. (2) Ibid. 211. (3) Ibid. 213.

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"the nature and extent of the enemy occupation which makes "the resident an enemy, I think that in these days one of the "most important tests would be the extent to which the "enemy, while in occupation, assumes to control the civil "rights of the subjects of the occupied country. And if that "control be for the material time effective I am inclined to "think that it matters not that the enemy contemplate to "withdraw that control at some future time or on some "future event, whether distant or not." Lord Thankerton says (1): that it is "a question of degree." Lord Porter says (2): "The inevitable conclusion must, I think, be drawn "that Holland has been for some two years, and is at present, "enemy-occupied territory controlled and administered by the "enemies of this country" and, later (3): "The solution, in "my view, depends on the quality of the occupation, to be "judged by the time it endures, the amount of control exercised, and the extent to which the former government is "superseded." And again (4): "It is enough, in my view, "if it appears from the known circumstances, that the civil "and military jurisdiction of the country is being exercised "by the enemy to the exclusion of the former civilian rulers." In view of these expressions of opinion we hope that we are justified in reading the language of Lord Wright in a way which will bring it into conformity with that used by the other members of the House who, while agreeing with his opinion, expressed their own views in different language. But even so, apart from the special case of Monaco, we have no evidence of the nature of the occupation. In the case of Poland, Czecho-Slovakia and Belgium, if we are entitled to accept what may be described as matters of common notoriety, the occupation would appear to be of the requisite character. In the case of such parts of Yugoslavia and Greece as are under effective enemy control, the case would appear to be the same. In the Channel Islands, if current reports are to be accepted, German interference with and control of the inhabitants and their civil rights would appear to be substantial and effective. What the exact position is in that part of France which was previously unoccupied seems obscure. We have no information as to the extent to which civil rights are being interfered with by the enemy in that part of France, save what is generally known with regard to conscription of labour. In the case of

(1) [1943] A. C. 203, 216.
(2) Ibid. 238.
(3) Ibid. 240.
(4) Ibid. 245.

Monaco, where there is one shareholder, we have some information. His name is "Giuseppe Cogito," his profession that of ragioniere or accountant. His earlier registered address was at Milan and the notepaper on which he notified his change of registered address to Monte Carlo gave two addresses in Italy as well as an address at Monte Carlo. We were invited to infer from these facts that he is an Italian national, but I do not think that we should be justified in doing so. The Foreign Office was unable to give any information as to the date or conditions of the occupation of the principality by Axis troops which, it said, had clearly been there for some time. The consul general of Monaco in London, in reply to an inquiry, says that, so far as he is aware, life is normal in the principality which is, he understands, "not occupied," although Italian troops are there. From this information, for what it is worth, we would infer that the occupation of Monaco is at present only a military occupation, although the Italian claims to the French coast as far as Nice may well suggest an ultimate intention on the part of Italy to annex the principality as well.

On the evidence before us we do not think that it would be safe to hold that all the shareholders whose registered addresses are in enemy-occupied territory are to be regarded as alien enemies at common law, but the position under the Trading with the Enemy Act is different and to an examination of that we now turn. By s. 2, sub-s. 1, of the Act "enemy" is defined as meaning (among other things) "any individual "resident in enemy territory." "Enemy territory" is defined in s. 15, sub-s. 1, as meaning "any area which is under the sovereignty of, or in the occupation of, a Power with whom "His Majesty is at war . . . ." Sect. 15 of the Act was amended by Order in Council dated July 10, 1940 (St. R. & O., No. 1214), by the insertion of sub-s. 1A as follows:—"The Board of "Trade may by order direct that the provisions of this Act "shall apply in relation to any area specified in the order as "they apply in relation to enemy territory, and the said "provisions shall apply accordingly." Under this new subsection orders have been made applying the Act to Monaco (St. R. & O., 1940, No. 1476), to what used to be known as unoccupied France (St. R. & O., 1940, No. 1219), to Yugoslavia (St. R. & O., 1941, No. 543), and to Mainland Greece (St. R. & O., 1941, No. 613). So far as we are aware, no similar orders have been made with regard to "occupied

"France," Poland, Belgium or the Channel Isles, but the occupation of these areas by the enemy is notorious and they fall within the definition of enemy territory contained in the Act itself. By sub-s. 2 of s. 1 of the Act the offence of trading with the enemy consists in having "any commercial, "financial or other intercourse or dealings with, or for the "benefit of, an enemy." Particular instances are given, including (iii.) the performance of "any obligation to . . . . "an enemy." By para. 2, (1.) of the Defence (Trading with the Enemy) Regulations, 1940 (St. R. & O., 1940, No. 1092), the Act was amended by expressly making it an offence to attempt to trade with the enemy.

As the result of this legislation, the company was forbidden by law to have or attempt to have any communication with any of the ninety-nine shareholders. It would have been an offence merely to put in the post notices addressed to them at their registered addresses. This is equivalent to suspending their right to receive notices, and during the period of suspension they can, in our opinion, be in no better position than they would have been if under the articles no right to receive notices had been given to them. The resolution, therefore, was validly passed.

We have not so far referred to the power of the Crown, both at common law and under the Act, to grant a licence to communicate with an enemy. It might be suggested that the company ought to have applied for a licence authorizing the sending of the notices, and there is reason to suppose that, if it had done so, a licence would have been granted, at any rate, in some of the cases, if not in all. In our opinion, there is no substance in this point. At the time when the meeting was called it was in fact illegal to send notices to these shareholders since no licence had been granted. We can find no reason for thinking that there was any obligation on the company to put itself to the trouble of applying for licences. Such an obligation could only exist by virtue of some contractual right in the shareholders concerned, and no such right exists or can be implied. All that the shareholders are entitled to under the articles is to have the notices put in the post, and this was, at the relevant time, forbidden by law. It is worth observing that, even if a licence had been applied for and obtained and even if the notices had reached the shareholders, they could not have voted at the meeting otherwise than by proxy, and before proxies could have been accepted and acted on, the persons to whom proxies were given would themselves have had to obtain licences to act. The appeal is allowed. The reduction of capital is confirmed, and the minute as settled by Bennett J. is approved.

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Appeal allowed.

Solicitors: *Freshfields, Leese & Munns.*

H. C. G.

In re THE SCOTTISH LIFE ASSURANCE COMPANY, LIMITED.

SIMONDS J.
1943
June 3.

Insurance (Life)—Deposit by assurance company—Application by company to vary investments representing deposit—Protection of interests of policy holders—Discretion of court—Rules relating to Deposits by Assurance Companies (St. R. & O., 1910, No. 566), r. 4 (a).

The court is not bound to accede to an application by an assurance company, under r. 4 (*a*) of the Rules relating to Deposits by Assurance Companies (St. R. & O., 1910, No. 566), for an order permitting the variation of the investments representing the deposit made by the company under s. 2, sub-s. 1, of the Assurance Companies Act, 1909, merely on proof that the value of the securities sought to be deposited is equal to or greater than that of the securities already deposited. The court is bound to protect the policy holders, and before it sanctions a variation, must be satisfied that the variation is expedient in the interests of the policy holders.

ADJOURNED SUMMONS.

The Scottish Life Assurance Company, Ld., deposited with the Paymaster-General the sum of 20,000*l.*, as required by s. 2, sub-s. 1, of the Assurance Companies Act, 1909. On March 22, 1943, the date of this summons, the deposit, as was permitted by r. 2 of the Rules Relating to Deposits by Assurance Companies (St. R. & O., 1910, No. 566) (1), was represented by 9250*l.* London, Midland and Scottish Railway Co. 4 per cent. preference stock and 11,125*l.* London and North Eastern Railway Co. 4 per cent. second preference stock, standing in court to the credit of "Ex parte the Scottish "Life Assurance Company, Ld. in respect of the life assurance "business." By this summons, the company asked (inter alia) that it might be empowered to bring into court by way of variation of the investments a sum of 3 per cent. savings bonds representing the nearest 1000*l.* in value above that of the railway stocks, and that, on the bringing into court of that amount of savings bonds, the railway stocks might be transferred to the company. There was evidence that the nominal value of the railway stocks was a few hundred pounds above the 20,000*l.*, and that, on March 31, 1943, the value of the London, Midland and Scottish Railway Co. stock was 7200*l.* 16*s.* 9*d.*, and that of the London and North Eastern Railway Company stock was 3525*l.* 16*s.* 3*d.*, the former thus being substantially, and the latter greatly, below par. Accordingly, taking the 3 per cent. savings bonds at their par value, it was proposed to bring into court 11,000*l.* worth of them.

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(1) By r. 2 of Rules Relating to Deposits by Assurance Companies: "Where any company is required, "in pursuance of the Act, to "deposit the sum of 20,000*l.* with "the Paymaster-General . . . . "the company, or the subscribers "of the memorandum of associa-"tion of the company or any of "them . . . . (in this rule referred "to as the depositors), may . . . . "make application to the Board "of Trade for a warrant, and the "Board of Trade may thereupon "issue their warrant to the "depositors for lodgment of such "deposit in court . . . . Provided, "that in lieu, wholly or in part "of the lodgment of money, the "depositors may bring into court

Guest Mathews for the company. There is evidence that the value of the 3 per cent. savings bonds which it is proposed to deposit is more than that of the stock at present deposited and, therefore, the court should grant the application.

Geoffrey Cross (*Danckwerts* with him) for the Board of Trade. The application ought to be dismissed. In proceedings of this kind the court must consider the interests of the persons whom this legislation is designed to protect, namely, the policy holders. Here there is no evidence that the variation sought would not be detrimental to the policy

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"as a deposit an equivalent sum "of any stocks, funds, or securities "in which cash under the control "or subject to the order of the "court may for the time being "be invested (the value thereof "being taken at a price as near "as may be to, but not exceeding, "the current market price) . . . ."

By r. 4: "Where a lodgment "of money or securities has been "made under the preceding rules, "the court may, on the applica- "tion of the company, order:—(*a*) "Investment in such of the "stocks, funds, or securities in "which cash under the control of "or subject to the order of the "court may for the time being be "invested as the applicants desire "and the court thinks fit, and "either by way of original invest- "ment or by way of variation "of investment."

holders, still less that it would be to their advantage. True, this company is in a substantial way of business, but, in considering an application of this nature, the court ought to bear in mind the position which might arise where the funds or securities constituting the deposit of, for example, a small company had depreciated in value, with the probable result that the policy holders were left with little, if any, security. Although the value of these railway stocks is low at present, they have a good chance of recovering, and, in the interest of the policy holders, the court ought not to release them. [He referred to *In re General Accident, Fire and Life Assurance Corporation, Ld.* (1).]

Mathews replied.

SIMONDS J. The first duty of the court is to protect those on whose behalf the deposit has to be made, namely, the policy holders. If, therefore, the court is asked to sanction a variation of investments, it must be satisfied that it is expedient to do so in the interests of the class concerned. In the present case there is no evidence either that the suggested variation is expedient or that there is any good reason why the investments should be varied. I offered counsel for the company an adjournment of the hearing so that he should have an opportunity of bringing before the court evidence on both these points. He did not, however, avail himself of that invitation, but contended that I was bound to accede to the company's application so long as the amount of the 3 per cent. savings bonds which it was proposed to bring into court was equivalent in value to that of the railway stocks. I do not take that view at all. In my judgment, the court has a discretion, and, in the exercise of that discretion, must ascertain why it is sought to change the investments. No argument has been addressed to me either that it is in the interests of the class of persons concerned that the investments should be varied or that those interests will not suffer by their being varied. Accordingly, I dismiss the application.

Solicitors: *Murray, Hutchins & Co.; Solicitor, Board of Trade.*

K. R. A. H.

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(1) [1933] Ch. 349.

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May 20.

In re M. KUSHLER, LIMITED.

Company—Winding-up—Fraudulent preference—Inference from facts—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 265, *sub-s.* 1.

K. and his wife were the sole directors and shareholders of a company to which its bankers had granted a permitted overdraft of 800*l.* guaranteed by K. and secured by policies on his life. On May 10, 1941, the overdraft stood at 609*l.* On May 12, the directors were advised that the company was insolvent and ought to be wound-up. Between May 12 and May 21 payments were made into the bank as the result of which the overdraft was extinguished. On May 23 a resolution was passed for the winding-up of the company. The liquidator claimed that the payments to the bank constituted a fraudulent preference, the matters relied on in support of this claim being: (1.) that the company paid substantially no trade creditor between May 10 and May 23; (2.) that a trade creditor had been pressing since the beginning of April for payment of a debt incurred by the company in February; (3.) that the bank had never pressed for reduction of the overdraft; (4.) that when a meeting of creditors was called on May 14, no notice of the meeting was sent to the bank, although at that date there was an overdraft; and (5.) that at the meeting of creditors on May 23, K. said the overdraft was guaranteed, not by himself, but by two persons whom he named:—

Held (reversing Bennett J.'s decision), that an intention to make a fraudulent preference had been established.

There is no difference in law between the evidence from which an inference may be drawn of intention to prefer and that supporting an inference of any other fact. Lord Tomlin in *Peak* v. *Gresham Trust, Ld.* [1934] A. C. 252, and Romer L.J. in *In re Lyons* (1934) 152 L. T. 201, were not intending to lay it down as a general principle that where there is no direct evidence of a fraudulent preference the court will not infer it if there is any other possible explanation of the facts proved.

APPEAL from Bennett J.

M. Kushler, Ld., was incorporated on July 13, 1934, with a capital of 2000*l.* in 2000 shares of 1*l.*, of which 1897 were issued as to 1796 to Morris Kushler and 101 to his wife. He and his wife were the directors, but she only took a subordinate part in the management of the company's business. The company's bankers were Lloyds Bank, Ld., who granted the company a permitted overdraft of 800*l.*, secured by the guarantee of Morris Kushler and four policies of assurance on his life for the total amount of 900*l.* This overdraft stood at varying amounts down to May 10, 1941, when it stood at 609*l.* 3*s.* 9*d.*

On May 12, the directors were advised that the company was insolvent and must be wound-up. Between May 12 and 21 sums amounting to 730*l.* 8*s.* 4*d.* were received by the company and paid into the company's account at the bank, with the result that the overdraft was extinguished and Morris Kushler was relieved of liability under his guarantee. On May 14 they issued notices calling a meeting of the creditors, and on May 23, 1941, a resolution was passed for the voluntary winding-up of the company. On November 6, 1942, the liquidator of the company took out a summons for a declaration that all payments to the bank between February 23 and May 23, 1941, or so much of these payments as went to extinguish the company's overdraft, constituted a fraudulent preference to the bank, contrary to s. 265, sub-s. 1, of the Companies Act, 1929, and for an order that the bank should repay these sums. Later, the claim was reduced to the payments between May 10 and 23, 1941. The special facts proved in evidence, relied on as showing a fraudulent intention to prefer the bank were: (1.) that between May 10 and May 23 substantially no payments were made by the company to existing trade creditors; (2.) that Messrs. Debenham & Co. had been pressing for payment of their February account of 88*l.* 1*s.* 6*d.* since the beginning of April, that at the request of Morris Kushler they consented to wait if half the amount was paid by the end of April, but that, in fact, no part of it had been paid; (3.) that the bank never pressed for reduction of the overdraft, and up to May 23, 1941, would have allowed the company to operate up to the limit of the permitted overdraft; (4.) that, although on May 14 there was still an overdraft, no notice of the creditors' meeting was sent to the bank; and (5.) that, at the meeting of creditors on May 23, Morris Kushler, in answer to a creditor's question, falsely said that the guarantors of the company's bank account were two persons called Cohen and Waldman, and omitted to say that he himself was the guarantor. Bennett J. held that the onus of proving a fraudulent preference rested on the liquidator. It was impossible to infer an intention to prefer before May 10, when the overdraft was 609*l.* Further, in view of the fact that on May 12 the company had been advised that it was insolvent and ought to be wound-up, it might be said that the company stopped payments to creditors in order not to prefer any of them, and paid the money received by the company into the bank without

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contemplating the consequence as regards the overdraft. That being a possible explanation, it was not open to him, in view of Lord Tomlin's judgment in *Peat* v. *Gresham Trust, Ld.* (1), and of the absence of direct evidence of intention to prefer, to hold that the liquidator had proved a fraudulent preference. The liquidator appealed.

Victor Aronson for the liquidator. There is clear evidence of an intention to prefer the bank and so relieve Morris Kushler of liability under his guarantee. The mere fact that from May 12 to May 21 over 700*l.* was paid into the bank and substantially no trade creditor was paid although Messrs. Debenham & Co. had been pressing for payment of their February account is enough to establish a fraudulent preference. The additional facts that the bank was not pressing for reduction of the overdraft, that no notice of the creditors' meeting was given to the bank on May 14, and that Morris Kushler made a false statement at the creditors' meeting as to who were the guarantors of the overdraft, put the matter beyond question. The only question in dispute is whether the onus which was on the liquidator to prove the fraudulent preference is discharged in view of *Peat* v. *Gresham Trust, Ld.* (1). The headnote in that case goes further than Lord Tomlin's judgment, for it suggests that an intention to prefer cannot be inferred in the absence of direct evidence. Bennett J. construed Lord Tomlin's judgment (1) as saying that, in the absence of direct evidence, the court cannot infer an intention to prefer fraudulently if there is any other possible explanation of the facts, but a possible alternative is not enough. If in the present case there was not a fraudulent preference, there never can be one. The evidence from which a fraudulent intention to prefer can be inferred does not differ from that on which any inference of fact can be inferred.

Belsham for the bank. The affairs of the company were carried on in the ordinary way until May 12 when the directors were advised that the company was insolvent and should be wound-up. Bennett J. has not misdirected himself on the law or the facts. Lord Tomlin's speech in *Peat* v. *Gresham Trust, Ld.* (1), says that the inference of intention to prefer must be the necessary and only inference. If the actions proved by the evidence may be directed to something other than intention to prefer, it is improper to speculate: see also

(1) [1934] A. C. 252, 262.

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In re Lyons (1), where Romer L.J. adopted the same view and held that a possible reason for paying sums into the bank instead of paying trade creditors was that the debtor did not wish to prefer some of his creditors. The same thing applies here. When once the directors had been advised that the company was insolvent, they could not do anything other than pay the money received into the company's bank. The bank would not allow a second account to be opened with the first account overdrawn. The liquidator has not discharged the onus of proof so long as a doubt remains in the mind of the court: Williams on Bankruptcy, 15th ed., p. 340. There were two alternatives in the present case: (1.) that it was intended to prefer the bank and relieve Morris Kushler of his liability as guarantor, and (2.) that the money was paid into the bank to avoid preferring one trade creditor to another. The court cannot in these circumstances find a fraudulent intention to prefer.

Aronson replied.

Lord Greene M.R. The period to which attention must be drawn is that between May 10 and May 23, and the question is what inference ought to be drawn from the evidence. The weight of evidence of conduct in these cases may vary very much according to the type of case with which the court is concerned. In some cases the circumstances may be insufficient to justify an inference of an intent to prefer, but at the other end of the scale comes the type of case, which is extremely familiar nowadays, where the person (such as a director) who makes the payment on behalf of the debtor is himself going to obtain by means of it a direct and immediate benefit. These cases of guarantees of overdraft and securities deposited to cover overdrafts are very common, and where directors have given guarantees the circumstance of a strong element of private advantage resulting from payment of the debt may justify the court in attaching to the other facts much greater weight than would have been attached to similar facts in a case where that element did not exist. √

Taking the whole situation in the present case, the proper inference to be drawn, in my opinion, is that the payments after May 10 were made with a view of giving to the bank a preference over the other creditors and so discharging the guarantee, but it is said (and the learned judge seems to have adopted this view) that no such inference can, as a matter of law, be drawn. He thought, apparently, that in cases where there is no direct evidence of the state of mind of the debtor (by which I understand no evidence by the debtor himself or evidence of admissions by him) it is not right to draw an inference of an intent to prefer if there is any other possible inference. That, it is argued (and the learned judge seems so to have thought), is a proposition of law to be extracted from what was said in the House of Lords in *Peat* v. *Gresham Trust, Ld.* (1). I must confess, looking at the matter apart from authority, that the language of the statute does not seem to me to warrant any such interpretation. The statute is directing the court to ascertain the state of mind of the payer in relation to a particular transaction. A state of mind is as much a fact as a state of digestion and the method of ascertaining it is by evidence and inference, and I can see nothing in the language of the section which justifies the view that the problem which the legislature sets the court is to be dealt with on any principles different from those commonly employed in drawing inferences of fact. It must, however, be remembered that the inference to be drawn is of something which has about it, at the least, a taint of dishonesty, and, in extreme cases, much more than a mere taint of dishonesty. The court is not in the habit of drawing inferences which involve dishonesty or something approaching dishonesty unless there are solid grounds for drawing them.

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(1) (1934) 152 L. T. 201.

To understand the language used by Lord Tomlin in his speech in *Peat* v. *Gresham Trust, Ld.* (1), with which the other members of the House concurred, it is important to appreciate the nature of the case and the arguments with which he was dealing. A creditor company had applied to register out of time a charge given to it by the debtor company and the debtor company withdrew its instructions to counsel to oppose the application. This withdrawal was said, as Lord Tomlin assumed, to amount to the suffering of a judicial proceeding and on the strength of this it was argued that an act of preference had been proved. There was no evidence of intent to prefer, either direct or circumstantial, but it was argued (2): "The ordinary rule is applicable—namely, that a man must "be taken to intend the result of his acts, and the withdrawal "resulted in the order being obtained." Lord Tomlin set himself to show that this argument was wrong and said:

(1) [1934] A. C. 252. (2) Ibid. 254.

"My lords, I do not accept this contention. In my opinion "in these cases the onus is on those who claim to avoid the "transaction to establish what the debtor really intended, and "that the real intention was to prefer." (1). That passage puts more concisely what I have already said seemed to me to follow from the section, and he goes on to say: "The onus "is only discharged when the court upon a review of all the "circumstances is satisfied that the dominant intent to prefer "was present"; and he adds: "Where there is not direct "evidence and there is room for more than one explanation "it is not enough to say there being no direct evidence the "intent to prefer must be inferred." The words "there "being no direct evidence" add nothing to the words "where "there is not direct evidence," but are a mere repetition. Lord Tomlin is refuting the argument of counsel for the liquidator that the intention to prefer must be inferred, in the absence of direct evidence, from the mere facts of the withdrawal of opposition and the consequential preferential treatment of the creditor. I do not think Lord Tomlin could have meant that, in every case where there is no direct evidence of intention to prefer, the court is bound to say that the onus of proof is not discharged if any view of the facts not involving an intention to prefer can possibly be taken. It is hard to imagine circumstantial evidence of facts in regard to which there might not be a possible alternative explanation. I cannot bring myself to believe that Lord Tomlin, who was only dealing with the particular facts and a particular argument in one case, intended to say that whenever there is some other possible explanation the inference of intention to prefer must not be drawn. It would be entirely contrary to his earlier statement that the court must be satisfied of an intent to prefer "upon "a review of all the circumstances." He continues: "In "the present case it is plain in my judgment that Mr. Wheeler's "action may have been due to reasons unconnected with any "intention to prefer. He may, for example, have come to the "conclusion that his position vis-à-vis the two companies "was such that he could not fairly take an active part in what "was done. It is improper to speculate what the reasons for "his action were, and in my opinion upon the material available the inference that the intent was to prefer cannot, in "law, properly be drawn." Those observations have relation to that particular case and the absence of evidence of intention

(1) [1934] A. C. 252, 262.

to prefer beyond the withdrawal of opposition and the effect that followed from that act.

Our attention was also called to a decision of this court in *In re Lyons* (1), where the guarantor of the debtor's overdraft was the debtor's father and an attempt was made to show that certain payments by the debtor into his bank were made with intent to prefer his father. There was something very artificial about that case, because it was from the time that the overdraft had been reduced to 2000*l.*, the limit of the father's liability under his guarantee, that the fraudulent payments into the bank were said to have begun, and the only evidence in support of a fraudulent preference was the subsequent progressive reduction in the overdraft. The Court of Appeal said that was not enough, for there might be many reasons why the payments into the bank exceeded the payments out and the evidence was insufficient to enable any sound judicial inference to be drawn. It was, I think, in reference to the facts of that case that one or two observations, particularly in the judgment of Romer L.J., are to be read. I do not read them as laying down any such extreme proposition as that which I have been discussing.

It is clear that Romer L.J. had Lord Tomlin's words in his mind and he was applying the principles which Lord Tomlin had laid down to the facts of *In re Lyons* (1) because they exactly fitted that case. He was not affirming some proposition of law which would preclude the court from ever drawing an inference as to the intention of the payer in a case where some other possible explanation was open. The result is, in my opinion, that the appeal should be allowed.

Luxmoore L.J. I agree.

Goddard L.J. I agree. I would add a few words because I was a party to the decision in *In re Lyons* (1). The law with regard to the onus of proof in this case is accurately summarized in Williams on Bankruptcy, 15th ed., p. 341. I do not think that there is any difference between the law as to the evidence from which you may draw inferences in matters relating to fraudulent preferences and that as to the evidence from which you may draw inferences as to other matters of fact.

The facts in *In re Lyons* (1) were very different from those in the present case. The authorities establish that the mere fact that a preference is shown is not sufficient to enable the court to draw the inference that that preference was fraudulent. Before that inference can be drawn the court must be satisfied that the dominant motive of the debtor was to prefer the particular creditor. It would be dangerous to attempt to lay down any particular circumstance or set of circumstances from which the court was or was not justified in drawing that inference, except to say that the mere fact that a preference is shown is not sufficient. For the rest, the matter stands as it does in any matter relating to a state of mind. Where in any criminal or civil court the person on whom the onus lies proves no more than a state of facts equally consistent with guilt or innocence, it is impossible to draw the inference of guilt. To give a person the benefit of the doubt only means that the case against him is not proved beyond reasonable doubt, and, therefore, fails. I do not think the authorities here lay down any other principle than that which applies in any case where evidence is necessarily circumstantial. In my view, for the reasons given by the Master of the Rolls, the inference of an intention to prefer here is overwhelming, and this appeal should be allowed.

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(1) 152 L. T. 201.

Appeal allowed.

Solicitors: *F. W. Perkins; Stafford Clark & Co.*

H. C. G.

In re POTTER'S WILL TRUSTS.

In re THOMSON'S SETTLEMENT TRUSTS.

ECKFORD *v.* THOMSON.

BENNETT J.
1943
May 26, 27.

Will—Construction—Executory trust—Direction to trustees to settle daughter's share on her marriage—"For benefit of my daughter "and that of any children she may have"—Husband's and wife's funds settled on children of marriage—Death of husband, and second marriage of wife—Right of children of second marriage to share with those of first marriage.

A testator gave a share of his residuary estate to his infant daughter to be paid to her at the age of twenty-five years or on

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POTTER'S WILL TRUSTS, *In re.*

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her marriage, and provided that, in the event of her marriage with her guardian's consent under that age, the share was to be settled by his trustees (who were also guardians of the daughter) "for my said daughter's benefit and that of any children she may "have." In 1869 the testator's daughter, then aged sixteen, was married to T. with her guardian's consent, and immediately before the marriage a settlement, to which the guardians were parties, was executed, settling the daughter's share under the will and a life policy to be effected by T. on her for life and then on the children of the marriage as she should appoint and in default of appointment to such children in equal shares, with a trust over in default of issue. T. died in 1875 leaving his widow and two children surviving him. No appointment in exercise of the power contained in the settlement was made, and in 1884 the widow married B. She died in 1940. There were two children of the second marriage, and they now claimed that the settlement made in 1869 did not conform to the directions of the testator's will as it should have provided for them equally with the children of the first marriage, and that it ought to be rectified accordingly :—

Held, that the guardians of the testator's daughter had a discretion in framing the terms of the settlement, and, having regard to the fact that when the settlement was made the intended husband was bringing property into it, they were entitled, in executing the direction contained in the testator's will, to make a settlement which excluded the children of a second marriage if, in all the circumstances as adjudged by them at the time, they came to the conclusion that a settlement in that form was for the benefit of the daughter and some of her children, and that, therefore, the action failed.

Dictum of Kay J. in *Nash* v. *Allen* (1889) 42 Ch. D. 54, 59 applied.

Semble, as a matter of construction, when the testator framed the executory trust in the will he had in mind a particular marriage and provision being made for that marriage.

ACTION.

By his will, dated June 12, 1854, and made and proved at Calcutta, the testator, Henry Maurice Potter, having appointed his wife, Amelia Anne Potter, and James William Henry Ilbury, executors and trustees and joint guardians of his infant daughter, Florence Julia Alice Potter, gave his residuary estate to them on the usual trusts to convert and to divide the residue into two equal parts, one of which he gave to his wife absolutely. He then directed his trustees to hold the other part "in trust for my infant daughter Florence Julia "Alice Potter to be paid to her on her attaining the age of "twenty-five years or day of marriage whichever may first "happen such marriage to be with the consent of her guardian "as hereinafter mentioned and in the meantime and till such "payment for the trustees of this my will or any other trustees "or trustee to be appointed as hereinafter mentioned to lay "out and invest the share of the said Florence Julia Alice "Potter in her name or in the names of the said Amelia Anne "Potter and James William Henry Ilbury or of such other "persons as shall happen to be the trustees for the time being "of this my will in the purchase of a competent share of the "public funds of India or England or on real estate whether "freehold copyhold or leasehold . . . . and to pay the "dividends interest and annual produce thereof or permit "and empower my said dear wife to receive the same and apply "it for the support and maintenance of my daughter "Florence Julia Alice Potter in such manner as she shall "think proper and to pay over the said principal moneys and "all interest and dividends thereon unto my said daughter "when she shall attain the age of twenty-five years or day of "marriage whichever shall first happen. Provided such "marriage is with the consent of the guardian or guardians "for the time being of this my will who I direct shall cause "such share to be properly secured by settlement for my said "daughter's benefit and that of any children she may have." After provisions which are not relevant, there was the following clause: " In the event of my said daughter leaving any child "children or issue of any child or children whether married "with her guardians' consent or otherwise then the said share "to vest absolutely in such child children or issue in such "manner as she my said daughter shall by will appoint or in "default of appointment then to such child children or issue "equally as per stirpes and not per capita."

The testator died on June 21, 1854. In August, 1869, Florence Julia Alice Potter, then aged sixteen, contracted a marriage with James Cameron Thomson, and on the occasion of that marriage, a settlement, dated August 3, 1869, was made, comprising the share of the testator's daughter in the testator's residuary estate and a policy of assurance to be effected by the husband. The parties to the settlement were the intending husband, of the first part; the testator's daughter, of the second part; the testator's widow, who had married Andrew Eagleshame as her second husband, the said Andrew Eagleshame, and J. W. H. Ilbury, of the third part; and A. Eagleshame and Alexander Gentle, trustees of the settlement, of the fourth part. The settlement, after reciting the intended marriage and the will of the testator, including the direction to make the settlement of the testator's daughter's share in her father's estate, provided "that in consideration "of the said intended marriage and in pursuance of the power "in that behalf contained in the will hereinbefore recited "the said Amelia Anne Eagleshame with the consent of her "husband Andrew Eagleshame . . . . and James William "Henry Ilbury do and each of them doth hereby assign unto "the said Andrew Eagleshame and Alexander Gentle the "sum of 49,200 rupees [the daughter's share in the testator's "estate] and the funds or securities on which the same are now "invested." After the marriage the trusts were to pay the income of the trust moneys and securities during the joint lives of the husband and the wife to the wife for her separate use independently of the husband, and after the death of the wife the trusts were to hold the premises and the income thereof "in trust for the child or for all or any such one or "more of the children of the said intended marriage in such "manner and form in every respect as the said Florence Julia "Alice Potter shall by deed or by will or codicil appoint and "in default of any such appointment and so far as no such "appointment shall extend in trust for all the children or any "the child of the said intended marriage who being sons or a "son shall attain the age of twenty-one years or being "daughters or a daughter shall attain that age or marry and "if more than one in equal shares." The settlement also contained the following clause: "If there shall be no child "of the said intended marriage who being a son shall attain "the age of twenty-one years or being a daughter shall attain "that age or marry then (without prejudice to the trusts "hereinbefore declared) the said trustees or trustee shall "hold the said trust premises and the annual income thereof "or so much thereof respectively as shall not have become "vested or been applied under any trusts or powers herein "contained upon the trusts following (that is to say) if the "said Florence Julia Alice Potter shall survive the said "James Cameron Thomson then after his death and such "default or failure of children as aforesaid in trust for the said "Florence Julia Alice Potter and her child or children by any "future marriage the same to be resettled on such marriage on "trusts similar to those herein contained." The settlement further provided that the policy of insurance which the husband was to take out should be held upon the same trusts as the wife's fund.

There was issue of this marriage three children, one of whom died an infant. The other two were the present trustees of the marriage settlement, and the defendants in these proceedings. The husband, J. C. Thomson, died in 1875. In 1884 the testator's daughter married a Mr. Bowman, and of that marriage there was issue two daughters, the plaintiffs. On June 8, 1940, the testator's daughter died. The testator's daughter did not at any time exercise the power of appointment conferred on her by the settlement. The plaintiffs brought this action against the defendants, claiming that the settlement of 1869 did not conform to the directions contained in the testator's will, and that it ought to be rectified so as to provide that the settled share of the testator's daughter should now be held by the defendants on trust for the plaintiffs and defendants in equal shares.

Christie K.C. and *Raymond Jennings* for the plaintiffs. The settlement of 1869 is not in accordance with the directions of the will, and the court should declare what the rights of the parties are now and rectify the settlement accordingly: *Young* v. *Macintosh* (1). The settlement should have provided equally for any children the testator's daughter might have, by whatsoever marriage or marriages she should contract, but the plaintiffs are her children and they have not been provided for: *Oliver* v. *Oliver* (2); *In re Gowan* (3). In *In re Parrott* (4), on which the defendants may rely, the testator was clearly only referring to the children of an existing marriage, but here the will was made long before the daughter's marriage and the testator must be taken to have intended to provide for the children of any marriage contracted by her. A converse case to *In re Parrott* (4) is *Nash* v. *Allen* (5). The settlement made in this case is not one of which the court would have approved. [*Cogan* v. *Duffield* (6) was referred to.]

Vaisey K.C. and *Wilfrid Hunt* for the defendants. The plaintiffs are seeking to set aside or rectify a settlement made no less than seventy-four years ago, and the burden of proof which is on them to show that a mistake was then made is a heavy one. No mistake was made. It is impossible now to reconstruct all the facts then known to and considered by the guardians, but the first husband brought a policy of assurance

(1) (1843) 13 Sim. 445.
(2) (1878) 10 Ch. D. 765.
(3) (1880) 17 Ch. D. 778.
(4) (1886) 33 Ch. D. 274.
(5) (1889) 42 Ch. D. 54.
(6) (1876) 2 Ch. D. 44.

into the settlement and there may well have been a bargain between the parties that, in consideration of this, the wife's property should be settled on the children of that marriage, to the exclusion of those of any subsequent marriage. The deed was obviously executed in good faith, and it ought not now to be set aside or rectified: *In re Spicer* (1). The words "any children" in the will do not mean "all the children" the testator's daughter might have by any marriage: *Cogan* v. *Duffield* (2). Even if all the children were intended to be benefited, there is nothing in the will to suggest that they were to be entitled in equal shares: *In re Galsworthy* (3). The reference in the will to the daughter's marriage confines the direction to make a settlement to one in favour of the wife and children of a particular marriage. A conveyancer who is instructed to make an infant's marriage settlement has a discretion in framing the trusts: *Nash* v. *Allen*, per Kay J. (4), and the court has a wide discretion in approving the form of such a settlement.

Christie K.C. replied.

BENNETT J. (having stated the facts): Mr. Christie's argument on behalf of the plaintiffs is that, on its true construction, the executory trust contained in the testator's will for the settlement of his daughter's share requires, so far as the capital is concerned, that the settlement should include as beneficiaries all the daughter's children. Mr. Vaisey, on behalf of the defendants, advances the proposition that the settlement which must be made in execution of the trust may contain any provision which the guardians of the testator's daughter reasonably believe to be for the daughter's benefit and that of some one or more of her children, regard being had to the fact that the settlement is being made on the occasion of the daughter's marriage to a particular person. Mr. Hunt, on behalf of the defendants, advances an argument based on a narrower ground. He submits that, on the true construction of the testator's will, the settlement to be made is on the marriage of the testator's daughter to a particular person and that the children to be benefited are the children of that particular marriage.

I am not without guidance on the way to construe an executory trust of the kind which is embodied in the testator's

(1) (1901) 84 L. T. 195.
(2) 2 Ch. D. 44.
(3) [1922] 2 Ch. 558, 567, 568.
(4) 42 Ch. D. 59.

will. Of course, the first thing to do is to have regard to the language of the trust. It is to be observed that the trust is not to "cause such share to be properly secured by settle-"ment for my said daughter and her children," but "for my "said daughter's benefit and that of any children she may "have." I think there is a real distinction between those two forms of words. Under the first form it would be impossible to include, as one of the objects of the trust to be embodied in the settlement, the daughter's husband, but under the form of words which the testator has used it might well be held that it would be for the daughter's benefit to insert into a settlement made on the occasion of her marriage some provision for the benefit of her husband. It would seem to be a reasonable view to hold, although it is not necessary in this case to decide it, that a wife might be quieted in her mind, and thus be benefited, by the thought that when she died her husband, if he survived her, would enjoy during his life the income of the property which she had brought into the settlement. So I attach importance to the language of this will.

The question which I have to decide is whether the provisions of the will compel those who are making the settlement to include as beneficiaries all the children of the daughter, at any age and by any marriage. Would a settlement, for example, not conform to the executory direction if it limited the children who were to benefit to those who attained twenty-one, or if it gave to the wife a power of appointment among the children of the marriage? With those questions in mind, I propose to read the opening passage from the judgment of Kay J. in *Nash* v. *Allen* (1). The terms of the executory trust with which he was dealing were not identical with those of the executory trust in the present case, but I think that he enunciated a principle which is applicable here. "In the first "place," he says, "I observe that this is an executory trust— "a trust to be carried out by the making of a settlement, for "which there is, of course, only a general direction; and in "framing such a settlement the court always exercises, if the "settlement has to be made under the direction of the court, "and any conveyancer to whom the preparation of the settle-"ment was submitted according to the will would in like "manner exercise, a certain discretion in modifying the "trusts." That I understand to be in framing the trusts.

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(1) 42 Ch. D. 59.

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In my judgment, having regard to the fact that when the settlement in the present case was made the intended husband was bringing some property into it, the guardians of the testator's daughter, in executing the direction contained in the testator's will, were entitled to make a settlement in the form of the one now before me which has in the events which have happened excluded the children of a second marriage if, in all the circumstances seen by them at the time, they came to a conclusion that such a settlement was for the benefit of the daughter and some of her children. On the true construction of the will, they had a discretion which enabled them to select from among all the daughter's children some who were to be beneficiaries under the settlement. They could have excluded children who died under the age of twenty-one, or made a settlement, which enabled the daughter herself, in the exercise of a power of appointment, to give the settled property exclusively to some of her children or one of her children.

On that broad ground this action fails. I also think, as a matter of construction, that when the testator framed the executory trust in the will he had a particular marriage in his mind, and was directing that a settlement should be made on that marriage. In such a case it certainly is not usual to include, not only the children of that particular marriage, but also those of a future marriage. For these reasons the plaintiffs are not entitled to the declaration for which they ask.

Solicitors: *Burton, Yeates & Hart, for Nye & Donne, Brighton; Arthur Pyke & Co.*

H. L. L.

UTHWATT J.

1943

Apr. 16, 20; *June* 1.

In re CATMULL (DECEASED).

CATMULL *v.* WATTS.

Family provision—Widow—Two-thirds of income of estate—Testator's dependants—Diminution of interests of other dependants—Estate not exceeding 2000*l.—Payment of capital—Maximum amount—Method of computation—Inheritance* (*Family Provision*) *Act,* 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-ss.* 3, 4.

A testator by his will gave his widow a life interest in his household goods and personal belongings and all the residue of his property equally between his six children, five daughters by a first wife, and one son by his second wife, all of whom, except one daughter, were dependent on him at the date of his death. The net personal estate was under 2000*l.* The widow applied for maintenance out of the testator's estate under the Inheritance (Family Provision) Act, 1938 :—

Held, that the court had jurisdiction under s. 1, sub-ss. 2 and 3, of the Act, to make provision for the widow amounting to not more than two-thirds of the income of the net estate during her widowhood, or, under s. 1, sub-s. 4, the capital value of that sum, and that the burden of any such provision must operate in diminution of the interests of the other dependants, a class which is to be ascertained at the testator's death and includes all his dependants and is not confined to such of his dependants who make and succeed in an application under the Act, but, having regard to all the circumstances, including the facts that the widow became entitled to a pension on her husband's death and that her present earned income was sufficient for her reasonable maintenance, the court, in the exercise of its judicial discretion, refused to make any order, except as to costs, in favour of the widow.

ADJOURNED SUMMONS.

The testator, W. R. Catmull, by his will dated August 2, 1935, appointed the defendant his executor and trustee, and gave his wife, Florence Catmull, a life interest in his household goods and personal belongings which were worth about 16*l.* He gave the residue of his estate on trust for sale and division between all his children in equal shares. The testator died on August 14, 1940, and his will was proved by the plaintiff on January 23, 1941, the net personal estate being sworn at 725*l.*, reducible after payment of testamentary expenses and costs of administration to approximately 600*l.* The testator was married twice. By his first wife he had five children, all daughters, of whom one was married at the date of his death and another had since married. His first wife died in 1917, and in 1919 he married his second wife, Florence, who had one child, a son who attained twenty-one on August 10, 1942. In July, 1941, the widow took out this summons under the Inheritance (Family Provision) Act, 1938, asking that reasonable provision should be made for her out of the testator's estate. The summons came before the court, and on March 10 a decision was given (1). The parties then agreed to a compromise under which the widow was to be paid 60*l.* in full satisfaction of her claim, but she refused to accept this and the case was ordered to be restored for re-argument.

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(1) [1943] W. N. 71.

UTHWATT J.

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CATMULL, *In re.* CATMULL *v.* WATTS.

Myles for the widow. On the true construction of the Act, there is nothing in it to prevent the court making provision for a "dependant" out of an estate in diminution of what the will gives to other dependants, provided that the limits of two-thirds or one-half of the estate, mentioned in s. 1, sub-s. 3, are not exceeded, and, therefore, the court can make provision for the widow without regarding the rights of the other dependants. The "dependants" of a testator referred to in the Act mean dependants by whom or on whose behalf an application for maintenance is being made under the Act and no others. That is so throughout the Act, but, in any case, the expression "applicable for the maintenance "of a testator's dependants" must, to make reasonable sense, be confined to dependants for whom maintenance is asked. The court, therefore, need only regard the interests of the widow. In the construction of the Act the particular objects for which it was passed must be borne in mind: see *River Wear Commissioners* v. *Adamson*, per Blackburn J. (1); and the object of this Act is to provide for those who seek relief under it. The court has a discretion under sub-s. 4 to make a larger provision than it could under sub-s. 3.

Sophian for the testator's son supported the application.

Astell Burt for the testator's unmarried daughters. The court has no jurisdiction to make an order which would have the effect of cutting down the interests of the four daughters of the testator who were dependent on him at the date of his death, which is the material point of time. "Dependant" in the Act must refer to all dependants, whether claiming under or against the will, and cannot be limited to a dependant or dependants making an application for maintenance. The court has to take into consideration the income of dependants who apply, but there is no provision for doing so in the case of dependants who do not apply. In making an order for a capital payment, under s. 1, sub-s. 4, the court cannot award more than the capitalized value of the maximum amount of income which it would order under sub-s. 3.

Myles replied.

Cur. adv. vult.

1943. June 1. UTHWATT J. read a judgment in which he stated the facts, and continued: At the original hearing I came to the conclusion on the facts that the conduct of the widow during her married life has not been such as to render her claim under the Act untenable. I then expressed some views on the construction of sub-s. 3, of s. 1, of the Act. The parties then agreed to compromise the matter, but, as a result of circumstances which it is unnecessary to detail, the go-by has been given to the compromise and the matter has been re-argued. As a result of that re-argument I have come to the conclusion that one of the views on the construction of the Act which I then stated is wrong. I propose, therefore, now to deal with the whole case.

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(1) (1877) 2 App. Cas. 743, 763.

Two connected questions of construction were raised on sub-ss. 3 and 4 of s. 1. Sub-sect. 3 runs as follows: "The "amount of the annual income which may be made applicable "for the maintenance of a testator's dependants by an order "or orders to be in force at any one time shall in no case be "such as to render them entitled under the testator's will as "varied by the order or orders to more than the following "fraction of the annual income of his net estate, that is to "say: (*a*) if the testator leaves both a wife or husband and "one or more other dependants, two-thirds; or (*b*) if the "testator does not leave a wife or husband, or leaves a wife "or husband and no other dependant, one-half." The first question is whether the phrase "testator's dependants" in the opening part of sub-s. 3 means such of the testator's dependants as bring forward and succeed in a claim made under the Act, or means dependants generally. The meaning attributed to the phrase must also be attributed to the word "them" in the succeeding phrase "such as to render them "entitled" etc. In my opinion, the phrase means dependants generally. The argument in favour of the former construction comes to this. The sub-section limits the amount which may be made applicable for the maintenance of dependants by an order or orders. An order can be made only on an application by a dependant. Therefore, the dependants referred to must be dependants who apply and succeed. I think that this construction of the sub-section is too narrow. In my view, sub-s. 3 states a general principle and is directed to defining the area within which any possible order authorized by sub-s. 1 of s. 1 may operate. The object of the Act was to interfere with the complete freedom of testamentary disposition theretofore possessed by testators. The sub-section defines what may be the subject-matter of orders, and, by inference, how much must remain at the free disposal of testators. The second question is whether in a case where the testator has made provision for certain or all of his dependants, giving them, in a case where he leaves a spouse and dependent children, two-thirds or more of the income, and where he leaves a spouse but does not leave dependent children, more than one-half of the income, there is jurisdiction to order maintenance in favour of an excluded dependant or a dependant who is not properly provided for. Subject to the operation of the proviso to sub-s. 1, I think there is jurisdiction. Under sub-s. 1 of s. 1, any dependant may, subject to the operation of this proviso, make an application and require his case to be considered. The effect of sub-s. 3 is only that, where an order is made, then the order must not be such as to produce the forbidden result. It follows that in the cases supposed the effect of sub-s. 3 is that any provision made by an order for a dependant must be made out of that income which is given to dependants by the will, and must not deal with more than two-thirds or one-half of the income as the case may be. It is true that in the ultimate event the dependants between them remain entitled to more than two-thirds or one-half of the income. That, however, does not result from the order but from the terms of the will. The views which I have expressed are in agreement with the judgment of Farwell J. in *In re Lidington* (1).

The remaining question argued arises on sub-s. 4, which is as follows: "Where the value of a testator's net estate does "not exceed 2000*l.*, the court shall have power to make an "order providing for maintenance, in whole or in part, by way "of a payment of capital, so however that the court, in "determining the amount of the provision, shall give effect "to the principle of the last preceding sub-section." It was contended that, on the construction of that sub-section, there was given jurisdiction to the court, in the case of estates not exceeding 2000*l.*, to order payment up to two-thirds or one-half of the capital, as the case might be, to dependants. In my opinion, this is not the effect of the sub-section. The direction is to give effect to the principle of sub-s. 3 in determining the amount of the provision. Under sub-s. 2 no order may provide for payment of income for a period which will last longer than the life of a dependant, and the principle involved in sub-s. 3 is to fix, for the purposes of such an order,

(1) [1940] Ch. 927.

the maximum amounts of income which may be ordered to be supplied. The principle of the maximum stated in sub-s. 3 embraces the purpose, the creation of interests not exceeding life interests, for which the maximum is to be used. If this be so, one does not give effect to the principle of sub-s. 3 by applying the fractions two-thirds or one-half to the capital of the estate. In my view, the point of sub-s. 4 is not to increase the total amount which might be made applicable for dependants by an order, but only to enable capital instead of income to be made so applicable. It is only an altered method of payment that is provided. This view of the section does not involve any practical difficulties. The court, in exercising the power given by sub-s. 4, can determine the amount of income which would, on an exercise of the jurisdiction under sub-s. 2, be allotted to the claiming dependant and the period for which payment of that income should continue and capitalize the sum. I may add that the view contrary to that which I have expressed would involve the capricious result of a large increase in the sum applicable at the court's discretion, where an estate was 2000*l.* or less in net value, over the sum so applicable where the estate was ever so slightly in excess of that sum, and would also be impossible to fit in with any principle which may be extracted from the proviso to sub-s. 1 of s. 1, which (whether the estate be more or less than 2000*l.* in value) precludes, in the circumstances there set out, a surviving spouse entitled under a will to two-thirds of the income of the net estate—as well as other persons—from making any application at all.

The result of my views on the construction of the Act is that in this case there is jurisdiction to make provision for the widow amounting to not more than two-thirds of the income of the net estate during widowhood or the capital value of that sum, and that the burden of any such provision must operate in diminution of the interests of the other dependants, a class to be ascertained at the testator's death.

Turning now to the particular facts of the case and taking the net estate at 600*l.* and as likely to earn interest at 3½ per cent., there is a resulting income of 19*l.* 10*s.* attributable to the estate. The resulting sum, two-thirds of 19*l.* 10*s.*, is 13*l.*, and income of that amount is the maximum sum in respect of which, in accordance with my view as to the effect of the Act, an order may be made. If the jurisdiction is exercised under sub-s. 3, the maximum sum is that amount of income to the widow during her widowhood, and, if it were a case where sub-s. 4 was brought into play, the capital sum would be assessed by reference to the widow's age and the sum of 13*l.*

Counsel then addressed his Lordship on the merits.

UTHWATT J. The question I now have to decide is whether in all the circumstances any provision ought to be made for the testator's widow under the Act. It cannot be said that the testator made an unreasonable will. For some reason he gave his widow only a life interest in the furniture, which was worth 15*l.*, and, apart from that, he gave the whole of the estate to his children. The net result of the disposition is that the children get about 100*l.* each and no more. As a result of the testator's situation in life and the compulsory contributions he made under the various Acts dealing with pensions and the like, his widow at his death became entitled to 10*s.* a week. In addition, on her attaining the age of sixty, under recent legislation that can be increased, by way of supplementation, to a sum, as I understand the matter, not exceeding 22*s.* 6*d.* a week, but that supplementary grant is only made in case of need. The children are all working people, and I see no reason why they should not, out of their own resources, be able to support themselves without the aid of anything derived from the testator. Equally, I see no reason why the widow should not support herself without the aid of anything derived from the testator. She is also in receipt of that amount which the State has thought proper to provide for the widows of working men. The court, of course, has a judicial discretion in this class of case. In exercising such a discretion, the court is bound, so far as possible, to ignore its personal views and to give effect to an informed impersonal outlook on the problem presented to it by the Act and the facts of the case. It is difficult, if not impossible, for a judge, in exercising a discretion, to get rid of his personal views, and, perhaps, equally difficult to state the way in which the varying considerations have influenced his decision, but in this case I am able, I think, to give explicitly the reason for not awarding anything to the widow. It is that, as a result of the testator's death, the widow received by way of widow's pension from the State such an amount as, having regard to the amount of the testator's estate, left him properly free, consistently with the object of the Act, to dispose of the whole of his estate by his will by dividing it among his children. I see no reason, therefore, for making any order in this case in favour of the widow. I order the costs of all parties to be paid out of the estate, except those of the widow, who is to have her costs up to the date of the last hearing, and, if no notice of appeal is lodged within six weeks, the whole of her costs as between solicitor and client.

Solicitors: *Avery, Son & Fairbairn*; *J. C. Clifford Watts*; *R. Struthers.*

H. L. L.

In re PLOWMAN.

WESTMINSTER BANK, LIMITED *v.* PLOWMAN.

COHEN J.
1943
June 3, 11.

Administration — Intestacy — Partial — Undisposed of surplus income of residue—Rights of widow—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33, *sub-s.* 1 (*b*); *s.* 49.

By his will, dated August 31, 1942, a testator appointed Westminster Bank, Ld., executor and trustee thereof, and, after directing payment by the bank of 1000*l.* absolutely and 500*l.* a year during her lifetime to his wife and 25*l.* absolutely and 7*l.* 10*s.* each month during her lifetime to one of his sisters, and after bequeathing certain pecuniary legacies, he directed "the remainder of my "estate to be held in trust and upon the death of my wife I should "like paid to my nephews . . . . 1000*l.* to G. L. and 1000*l.* to R. L. "and the remainder in parts to charities that my wife will hand "to the bank." On September 4, 1942, the testator died. A summons was taken out by the bank to determine various questions which arose under the will, and, the court having held that the residuary estate was validly given to the charities, but that the surplus income of the residue was undisposed of until the death of the testator's widow and passed as on an intestacy, the question arose whether, under the Administration of Estates Act, 1925, this surplus income was wholly payable to the widow or whether each instalment should be apportioned between capital and income, and, if so, on what principle:—

Held, that, as s. 33, sub-s. 1 (*b*), of the Act applied only to cases of intestacy affecting the whole interest in the estate or in some part thereof and not to an intestacy as to a partial interest in the residuary estate such as a life interest, and, therefore, did not apply to the present case, the surplus income must be held in trust for, and be payable to, the widow, subject to the charge under s. 46, sub-s. 1, to secure payment of 1000*l.* to her with interest until paid.

In re McKee [1931] 2 Ch. 145 applied. *In re Thornber* [1937] Ch. 29 referred to.

COHEN J.
1943
PLOWMAN, *In re*.
WESTMINSTER BANK, LD.
v.
PLOWMAN.

ADJOURNED SUMMONS.

The facts are sufficiently stated in the headnote.

G. D. Johnston for the bank.

Vanneck for the widow. The surplus income of the residue is undisposed of and there is a partial intestacy which, under s. 49 of the Administration of Estates Act, 1925, must be dealt with on the same principle as an intestacy. The trust for sale of the property of a person who dies intestate, which is imposed by s. 33, sub-s. 1 (*b*), of the Act (1) does not, however, apply in the case of a partial intestacy: see *In re Thornber* (2). [He referred to ss. 46 and 49 of the Act and to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. ii., pp. 1454, 1492 and 1506.] There being no trust for sale, this is property which the bank, as trustee, is bound to retain, and the income is payable to the widow as tenant for life. [He referred to *In re Sherry* (3).] *In re McKee* (4) is the exact converse of this case.

J. A. Wolfe for a sister of the testator. This being a partial intestacy, the surplus residuary income must be dealt with as directed by s. 46, with the result that it must be retained as capital.

Pennycuick for the remaining sister of the testator.

Danckwerts for the Attorney-General.

Cur. adv. vult.

June 11. COHEN J. read the following judgment: This will gave rise to a number of questions. I have already dealt with all except one which arises by reason of my having held that the surplus income of the residuary estate is undisposed of and passes as on an intestacy. I should mention that the testator left no issue or ancestor him surviving, and had no brother who, or any issue of whom survived the testator, and had no sister who predeceased him leaving issue who survived him, so that the only persons beneficially interested in any property of the testator undisposed of by his will are his widow and his two sisters. The answer to the question which I have to decide depends on the construction of certain sections of the Administration of Estates Act, 1925. The sections which are or may be relevant are ss. 33, 46 and 49. But for the decision in *In re McKee* (1), it might have been argued that the right to the undisposed of income falls to be dealt with under s. 33, and is, therefore, subject to a trust for sale, that this right should be sold, and that the widow is entitled only to the income arising from the proceeds of sale. However, the decision in that case, in my opinion, makes it impossible for me so to hold and, indeed, counsel, who represented the next of kin did not, I think, argue to the contrary. The headnote in *In re McKee* (1) is in the following terms: "By "his will a testator who died in 1928, after making certain "bequests, devised and bequeathed all his real and personal "estate not otherwise disposed of to his trustee upon trust "for sale and conversion, and after paying his funeral and "testamentary expenses, debts and legacies, to invest the net "residue, and to stand possessed of the net residue and the "investments thereof upon trust to pay the income to his "wife for life, and after her death to divide the same between "his surviving brothers and sisters. The last of the brothers "and sisters died in 1930. The widow was still living. On "the construction of the will surviving brothers and sisters "were held to mean brothers and sisters surviving the widow, "and there was therefore an intestacy as to the reversionary "interest in the testator's residuary estate expectant on the "widow's death: Held (affirming the decision of Maugham J.) "—(1.) That the reversionary interest ought not to be forthwith sold; (2.) That the funeral and testamentary expenses "and debts were not payable out of the proceeds of the "reversionary interest as property undisposed of by the will "but out of the estate before the residue was ascertained; "(3.) That the widow was not entitled to any immediate "payment in respect of the property undisposed of under "sections 46 and 49 of the Administration of Estates Act, "1925, but that by virtue of these sections her personal

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(1) By Administration of Estates Act, 1925, s. 33, sub-s. 1: "On the death of a person "intestate as to any real or "personal estate, such estate shall "be held by his personal repre"sentatives . . . . (*b*) as to the "personal estate upon trust to "call in sell and convert into "money such part thereof as may "not consist of money."

By s. 49: "Where any person "dies leaving a will effectively "disposing of part of his property, "this part of this Act shall have "effect as respects the part of his "property not so disposed of "subject to the provisions con"tained in the will and subject "to the following modifica"tions . . . ."

(2) [1937] Ch. 29, 35.

(3) [1913] 2 Ch. 508.

(4) [1931] 2 Ch. 145, 159.

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(1) [1931] 2 Ch. 145.

"representatives would on her death be entitled to receive "thereout 1000*l.* with interest at 5 per cent. per annum from "the testator's death but nothing further." It will be observed, from what I have read, that that case differed from the present case, not only in the subject-matter of the intestacy, which was a reversionary interest in the residuary estate instead of a life interest therein, but also in two other respects. First, the will in that case contained a trust for conversion, whereas there is no such trust to be found in the present will. Secondly, it was impossible in that case to decide at the date of the testator's death whether or not the will effectively disposed of the whole property, whereas in the present case the existence of the intestacy could be established as soon as the testator died. The last two differences which I have pointed out undoubtedly form a large part of the ground of the decision of Maugham J. in the court of first instance. I would refer to two passages from his judgment, the first of which is where he says (1): "It is therefore, I think, impossible to hold that part IV. of the Act which is headed "'Distribution of residuary estate,' does not apply to items "of property as to which it may be determined many years "after the death that they devolve as on intestacy; for the "old law no longer applies. On the other hand, it does not "follow that part III., which relates to 'Administration "'of assets,' applies to the case of a testator as to whom "it cannot be asserted at the date of his death that he is "partially intestate." Later, he says: "I have come to the "conclusion that a trust in the usual form for sale and conversion of the residue of the real and personal estate of a "testator contained in his will altogether precludes the operation of the statutory trust for sale under s. 33, sub-s. 1. "The testator has by his will created the trust for sale and "conversion of his estate, and has stated how the residue after "payment of debts, etc., is to be applied, at any rate for a period. "It is not, I think, consistent with this provision that the "reversion, so to speak, in a fund or residue so created is itself "to be sold, for this reversion never was in an accurate sense " a part of the estate of the testator at the time of his death." In the Court of Appeal, however, the decision was based on wider grounds. Lawrence L.J., in the course of his judgment, said (2): "In my judgment the fundamental error underlying "this contention [that the reversionary interest should be

(1) [1931] 2 Ch. 148, 150.

(2) Ibid. 160.

"sold and the proceeds dealt with for the benefit of the widow] "consists in treating the reversionary interest in question as if "it were an item of the personal estate belonging to the "testator at the date of his death, which fell to be converted "into money by the trustee either under the trust for sale in "the will or under the statutory trust for sale contained in "s. 33 of the Administration of Estates Act, 1925, or under "the rule in *Howe* v. *Earl of Dartmouth* (1). It is plain to "my mind that it is nothing of the kind, but is a beneficial "reversionary interest in the testator's residuary estate, which "first came into existence on the testator's death by the joint "operation of his will and the statute and vested in and now "belongs to the persons in whose favour it was created; the "trustee has no power of disposition over it. If I am right in "this view it follows that when the period of distribution "arrives on the death of the widow, she is not entitled to "have the residue apportioned between herself and the "remaindermen on the principle laid down in *In re Earl* "*of Chesterfield's Trusts* (2)." Romer L.J. said (3): "Now, in "connexion with this matter, our attention was called to the "provisions of s. 33 of the Act dealing with the case of a "person dying intestate as to any real or personal estate. "If that section applied to the present case, it would no "doubt create much difficulty. In my opinion, however, "the section is confined to the case of a person dying intestate "as to some one or more specific items of his real or personal "estate, and does not extend to a case like the present, where "there is a will which deals with every item of the testator's "estate, but omits to dispose of every interest in that estate. "There is no provision in the Act that the words 'real and "'personal estate' include any interest in real or personal "estate. It is not therefore permissible to read s. 33 as "referring to a person dying intestate as to any interest in "his real or personal estate. Nor are the provisions of the "section at all applicable to such a case. By way of illus-"tration, let me take the case of a testator who has given the "whole of his personal estate to his executors and trustees "upon the usual trusts for conversion, payment of debts, "funeral and testamentary expenses and legacies, and then "to stand possessed of the residue upon trust for two persons "in equal shares, of whom one predeceases the testator.

(1) (1802) 7 Ves. 137.

(2) (1883) 24 Ch. D. 643.

(3) [1931] 2 Ch. 145, 165.

"If the one-half of the testator's net residue is to be treated "as personal estate of his, as to which he has died intestate, "then that half is to be held upon the trusts specified in sub-ss. "1 and 2 of s. 33 of the Act. But the sale of the testator's "personal estate will already have been effected, in order to "produce the very residuary estate of one-half of which the "testator has failed effectually to dispose. The section seems "therefore quite inapplicable to such a case. Sect. 49 on "the other hand appears to be expressly designed to meet it. "The language is now changed. Instead of referring to "'any real or personal estate' as to which a person may die "intestate, the latter section refers to part of a testator's "'property,' a change which seems to be deliberate and "attributable to the definition of property to which I have "already referred. It is moreover to be observed that this "construction of the two sections avoids the necessity of "treating s. 49 as being almost entirely superfluous. For if "s. 33 applies to such a case as I have mentioned, the one-half "of the testator's residue must constitute the 'residuary "'estate of the intestate' within the meaning of sub-s. 4 of "the section, and it did not require s. 49 to make part IV. "of the Act applicable to it, or to provide that part IV. should "apply to it 'subject to the provisions contained in the will.' "Part IV. would have applied to it even if s. 49 had not been "in the Act, because it was residuary estate of the intestate; "and it would have applied 'subject to the provisions of the "'will' because of sub-s. 7 of s. 33. For these reasons I "cannot regard s. 33 as throwing any light upon the question "of what has to be done with the reversionary interest of which "the testator has failed to dispose. The trusts upon which "it is to be held are, as I think, to be found in part IV. of the "Act, and nowhere else." From these passages it is clear that, in their lordships' view, s. 33 applies only to cases of intestacy affecting the whole interest in the estate or some part thereof and not to an intestacy as to a partial interest in the residuary estate, such as a life interest in the case now before me. In my opinion, therefore, s. 33 does not apply.

It was, however, contended that, as and when each instalment of undisposed of income is received by the trustee, it must be treated as part of the residuary estate, and must, therefore, under s. 46, subject to payment to the widow of her 1000*l.*, plus interest at five per cent., be invested, only the interest of such investment being payable to the widow.

On the other hand, Mr. Vanneck argued that what is undisposed of is income of the residuary estate, and that, although the facts of this case are in a sense the converse of those in *In re McKee* (1), the principle laid down there applies, and, accordingly, the balance of the income of the residuary estate is payable to the widow. I have come to the conclusion that this contention is well founded. The property undisposed of in the present case is income of the residuary estate of the testator. That residuary estate arises in the present case, not from the operation of s. 33, but from the performance by the executor of the duties imposed on him by virtue of his appointment in the will. None the less, it is income of the residuary trust fund and, as the testator left no issue, I think I am bound to hold that, subject to the charge in favour of his widow to secure payment of a net sum of 1000*l.* with interest at five per cent. per annum, until paid, the undisposed of income is held in trust for Mr. Vanneck's client.

In arriving at this conclusion I derive assistance from the decision in *In re Thornber* (2). In that case the headnote states the facts as follows: "A testator, after bequeathing an annuity "to his mother, directed his trustees out of the annual income "of his residuary estate to pay an annuity to his wife, and he "further directed that the surplus income of his residuary "trust fund should be accumulated during the life of his wife "or for twenty-one years from his death (whichever period "was the shorter); and he directed that at the expiration of "the period of accumulation his residuary trust fund should "be held upon trust, as to both capital and income and the "accumulations of such income, for his children. The testator "died without issue, and his widow claimed that she was "entitled to call on the trustees to stop the accumulation of "any surplus income of the residuary estate and deal with "any such surplus income as upon an intestacy. The "testator's mother claimed that the accumulations ought to "be continued:—Held, that the testator having died without "issue there was no effective disposal by his will within the "meaning of s. 49 of the Administration of Estates Act, 1925, "of the residuary estate, and that the direction to accumulate "the income was not a direction to which the property not "effectively disposed of by the will was subject. Held, "therefore, that, subject to making provision in due course of "administration for the annuity given to the testator's mother,

(1) [1931] 2 Ch. 145.

(2) [1937] Ch. 29, 35.

"the trustees ought not to accumulate the surplus income, "but that it ought to be dealt with as income from the residuary "estate undisposed of by the testator." It will be sufficient for my purpose to refer to one passage in the judgment of Romer L.J. in the Court of Appeal where he said: "Now, as "I have said, the first thing to be ascertained is what interest "in the testator's property has been undisposed of by his "will . . . . It is sufficiently plain that, subject to the "annuity to the mother and, of course, other legacies and so "forth, and subject to the annuity to the widow, the testator's "residuary estate is undisposed of and that the accumulation "directed by the will is an accumulation directed solely for "the purposes of his ultimate residuary gift to his children and "fails with that gift. Sir Gerald Hurst in the course of his "argument agreed when I asked him whether before the Act "the next of kin could not have insisted upon receiving the "surplus income from year to year after the two annuities "had been disposed of, and, of course, he had to agree that that "was the case; the next of kin would have been entitled to "claim that income as being income undisposed of by the will. "It follows that under s. 49 the income in the corpus of the "estate will now be held upon the trusts set out in s. 46 "and that the trust for accumulation has no application "whatsoever."

As there is nothing but income in question, Mr. Vanneck's client would receive the whole of the undisposed of property, even if there were no charge, and it will be sufficient if I declare that the income which passes on the intestacy is wholly payable to the testator's widow. The costs should be taxed and paid out of the estate, but the amount so taxed and paid should be recouped out of the undisposed of income so far as necessary for the purpose.

Solicitors: *M. Greenwood; Carter & Barber; Treasury Solicitor.*

J. L. D.

Applied. Re NORTON'S WILL TRUSTS. [1948] 2 All E.R. 842.

Applied. Re COXEN. [1948] Ch. 747

In re DALZIEL.

COHEN J.

1943

June 3, 4, 29.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* ST. BARTHOLOMEW'S HOSPITAL.

Will—Charity—Tomb—Maintenance and rebuilding—Conditional gift to charity—Validity.

A testatrix gave 20,000*l.* to the governors of a hospital to add to an existing discretionary fund of 2000*l.*, on which the cost of the upkeep of a family mausoleum was a first charge, on condition that they should use the income as far as was necessary to maintain and, when necessary, rebuild the mausoleum and directed that "if they shall fail to carry out this request I give the said sum of "20,000*l.* to such other of the charities named in this my will as "my trustees may select and as shall be willing to accept the legacy "subject to the above conditions" :—

Held, that, the upkeep of the mausoleum not being a charitable object, the gift failed, and that the gift over also failed.

In re Tyler [1891] 3 Ch. 252, and *Chamberlayne* v. *Brockett* (1872) L. R. 8 Ch. 206, followed.

ADJOURNED SUMMONS.

By cl. 11 of her will, dated November 14, 1935, the testatrix, Harriett Sarah, Baroness Dalziel, who died on December 7, 1938, made the following disposition : "I give to the governors "of St. Bartholomew's Hospital the sum of 20,000*l.* free of all "death duties to be added to and form part of the existing "Dalziel of Wooler Discretionary Fund and I give this legacy "upon and subject to the condition that the said governors of "St. Bartholomew's Hospital shall use the income to arise "from this legacy as far as is necessary for the upkeep of the " . . . . mausoleum in Highgate Cemetery and the garden "surrounding the same that they shall keep the same in good "repair and the inscriptions thereon legible and to rebuild the "same when requisite and if they shall fail to carry out this "request I give the said sum of 20,000*l.* to such other of the "charities named in this my will as my trustees may select and "as shall be willing to accept the legacy subject to the above "conditions." In 1938 the testatrix had transferred to the trustees of a discretionary fund held for the benefit of the hospital the sum of approximately 2000*l.*, which sum was to be known as "The Dalziel of Wooler Discretionary Fund,"

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on the terms that the cost of the upkeep of the mausoleum should be a first charge on that fund. A summons was taken out by the executors and trustees of the will to determine (inter alia) whether the bequest contained in cl. 11 was valid.

Wilfrid Hunt for the executors and trustees.

J. A. Reid for the governors of the hospital. This is an absolute gift to the hospital. The testator sought to impose a condition which would lead to a perpetuity. A gift qualified by a condition subsequent is bad. The gift stands and the condition fails. [He referred to Jarman on Wills, 7th ed., vol. ii., p. 1443; *Poor* v. *Mial* (1); and *In re Chardon* (2).]

Danckwerts for the Attorney-General. This is a valid gift to the hospital: see *In re Tyler* (3), a case which was based on *Christ's Hospital* v. *Grainger* (4). If a trust of this sort is attached to a charitable gift, the trust may sometimes be disregarded and the gift may be held to be valid. [He referred to *In re Rogerson* (5) and *In re Davies* (6).]

Vanneck for a legatee. This is not a charitable gift, and, that being so, the whole gift fails. [He referred to *Chamberlayne* v. *Brockett* (7) and *Chapman* v. *Brown* (8).] The condition is not a condition subsequent, but a trust and void ab initio.

Winterbotham for an annuitant. This gift is not charitable and it fails for uncertainty. The fund is wholly indefinite as the governors are not in any way bound with regard to the purposes to which they apply it. The gift is also void as infringing the rule against perpetuities: Tudor on Charities, 5th ed., p. 75. The decisions in which gifts involving the upkeep of tombs have been held to be valid are mainly based on the trifling amounts allocated to the upkeep of the tombs or on the imposition of a moral obligation, and some of these decisions, unlike the present case, contain no gift over in the event of non-compliance with the condition. Here the amount is not trifling, and, as the testatrix provided for a gift over, she clearly did not intend to impose a moral obligation on the governors to maintain the mausoleum. [He referred to *Fisk* v. *Attorney-General* (9); *In re Rogerson* (10); *Hunter* v.

(1) (1821) 6 Madd. 32.
(2) [1928] Ch. 464.
(3) [1891] 3 Ch. 252.
(4) (1849) 1 Mac. & G. 460.
(5) [1901] 1 Ch. 715.
(6) [1915] 1 Ch. 543.
(7) (1872) L. R. 8 Ch. 206.
(8) (1801) 6 Ves. 404.
(9) (1867) L. R. 4 Eq. 521.
(10) [1901] 1 Ch. 715.

Bullock (1); *Dawson* v. *Small* (2); *In re Williams* (3); *In re Birkett* (4); and *In re Porter* (5).]

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Rawlence for the residuary legatees.

Cur. adv. vult.

June 29. COHEN J. read a judgment in which, after stating the facts and saying that it was clear from the correspondence that the governors of the hospital were free to direct the application of the discretionary fund towards the maintenance of the mausoleum, he continued: This is clearly not a charitable object, for, if it were, it would not have been necessary in the "tomb cases," to which I shall refer later on, to construe the direction as to maintenance of the tomb of the testators in question in those cases as imposing only a moral obligation. In this connexion I would refer to *In re Tyler* (6), a case in many respects comparable to the case before me. The headnote in that case is in the following terms: "A "testator gave a fund to the trustees of charity A., and com"mitted the keys of his family vault in H. cemetery to their "care and charge, ' the same to be kept in good repair, and "' name legible, and to rebuild when it shall require: failing "' to comply with this request, the money to go to ' charity "B.:—*Held* (affirming Stirling J.), that the condition for the "repair, etc., of the family vault was valid, and binding on "charity A., and that the gift over, on failure to comply with "the condition, to charity B. was good, on the principle that "the rule against perpetuities has no application to a transfer, "in a certain event, of property from one charity to another." The passage to which I wish to refer at the moment is a passage in the judgment of Stirling J. in the court of first instance, in which he says: "It is said that the condition "tends to produce or bring about a misapplication of funds "devoted to charitable purposes, and the case of *Wilkinson* v. "*Wilkinson* (7) was referred to as shewing that the gift must, "therefore, be held to be bad. I am, however, unable to see "that the condition imposed here tends necessarily to a breach "of trust on the part of the trustees of the society. Such "societies depend largely on the voluntary contributions of "their supporters; and the funds required for keeping the

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(1) (1872) L. R. 14 Eq. 45.
(2) (1874) L. R. 18 Eq. 114
(3) (1877) 5 Ch. D. 735.
(4) (1878) 9 Ch. D. 576.
(5) [1925] Ch. 746.
(6) [1891] 3 Ch. 252, 254.
(7) (1871) L. R. 12 Eq. 604.

"family vault in repair may readily, I doubt not, be obtained "from persons willing to subscribe for the purpose of retaining "the administration of this large fund in the hands of the "society, and without in the least trenching on any funds "devoted to charitable purposes." This judgment, which was approved by the Court of Appeal, makes it clear that, while there is no objection to a body formed for charitable purposes receiving and applying funds given to it absolutely in paying for the upkeep of a tomb, the upkeep is not a charitable object. It follows, therefore, that I must hold that the gift of 20,000*l.* to the hospital "to be added to and form part of "the existing Dalziel Wooler Discretionary Fund" fails.

My attention was called to a passage in *Chamberlayne* v. *Brockett* (1). It is in these terms: "On the other hand, if "the gift in trust for charity is itself conditional upon a future "and uncertain event, it is subject, in our judgment, to the "same rules and principles as any other estate depending for "its coming into existence upon a condition precedent. If "the condition is never fulfilled, the estate never arises; "if it is so remote and indefinite as to transgress the limits "of time prescribed by the rules of law against perpetuities, "the gift fails ab initio." The principle there laid down clearly applies, and I must, therefore, declare that the whole gift contained in cl. 11 fails.

The further question as to the effect of the imposition of the condition as to the upkeep of the tomb and of the gift over was also fully argued and, as the case may go to a higher court, it is right that I should state shortly the conclusions to which I have come on this point. [His Lordship read that part of the clause which contained the condition, and continued:] As I construe this part of the clause, it does not merely impose a condition. If this were all it did, Mr. Reid's argument, based on a passage in Jarman on Wills, vol. ii., 7th ed., p. 1443, that it is a condition subsequent, and, being void, the bequest is absolute, might be well founded. On the contrary, I think that it amounts to a direction that the income of the fund shall be applied in the first instance to the purposes therein defined in connexion with the tomb. Unless, therefore, I can construe the clause as imposing only a moral obligation, I must find that the trusts, at any rate so far as they relate to the upkeep of the tomb, are bad. In support of the validity of the gift, Mr. Danckwerts invited my attention to *In re*

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(1) L. R. 8 Ch. 206, 211.

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Rogerson (1), the last of the tomb cases, where Joyce J. said: "Where, however, there is a trust for a tomb, as here, then, as "Bacon V.-C. pointed out in *Dawson* v. *Small* (2)—a similar "case—' the obligation to keep up the tombstones is merely "' honorary, but the obligation to give all that is not applied for "' the purposes first mentioned in favour of these poor people is "' by no means honorary; it is a trust that must be executed.' "Testators who make bequests of this nature, if they know "the law, really mean the legacy to go to the objects of the "charitable bequest with a moral obligation to keep up the "tomb." The effect of these cases is summarized in Tudor on Charities, 5th ed., p. 62, where the learned author says: "A number of cases, in which there have been gifts upon "trust to keep up tombs not forming part of the fabric of a "church, with a gift of the particular residue to charity, "may be regarded as establishing this special rule of law: "' Where a fund has been given to trustees upon trust to apply "' the income in keeping a tomb in repair, and as to the "' remainder of the income for valid charitable purposes, it "' has been held that the result of the failure of the trust for "' the repair of the tomb is that the whole of the income "' becomes applicable for the charitable purpose.' "

Mr. Winterbotham, for a party interested to dispute the validity of the gift, made a careful analysis of these cases and pointed out that they appear all to have been based either on the trifling amount involved, as in *Fisk* v. *Attorney-General* (3), or on the view that the testator intended to impose a moral obligation as in *In re Rogerson* (4). He pointed out that that class of case was distinguishable from the present case in that (*a*) the upkeep of a tomb costing over 20,000*l.*, with a possible liability to rebuild it, necessarily involved more than a trifling amount, and (*b*) some of the wills considered in the tomb cases contained no gift over in the event of failure to maintain the tomb. The last distinction seems to me vital. I think that the real foundation of the tomb cases is that the court felt itself able to construe the provision in the various wills as to the upkeep of the tombs as imposing only a moral obligation. Now, a gift over to take effect in the event of failure to maintain the mausoleum in good repair is only consistent with the view that the obligation to maintain the mausoleum was not to be a mere moral obligation. This

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(1) [1901] 1 Ch. 715, 719.

(2) L. R. 18 Eq. 114.

(3) L. R. 4 Eq. 521.

(4) [1901] 1 Ch. 715.

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view is supported by the observations of Fry L.J. in *In re Tyler* (1), to which I have already referred. The learned lord justice says: "In this case the testator has given a sum "of money to one charity with a gift over to another charity "upon the happening of a certain event. That event, no "doubt, is such as to create an inducement or motive on the "part of the first donee, the London Missionary Society, to "repair the family tomb of the testator. Inasmuch as both "the donees of this fund, the first donee and the second, are "charitable bodies, and are created for the purposes of charity, "the rule of law against perpetuities has nothing whatever to do "with the donees. Does the rule of law against perpetuities "create any objection to the nature of the condition? If the "testator had required the first donee, the London Missionary "Society, to apply any portions of the fund towards the repair of "the family tomb, that would, in all probability, at any rate, to "the extent of the sum required, have been void as a perpetuity "which was not charity. But he has done nothing of the sort. "He has given the first donee no power to apply any part "of the money." As I have already said, as I construe this bequest in this case, Lady Dalziel has not only given power, but directed the trustees to apply part of this gift or, if necessary, the whole of this gift in the maintenance of the tomb. I should be bound, therefore, if necessary, to hold that the trusts, so far as they are for the upkeep and repair of the mausoleum and surrounding garden and for rebuilding the mausoleum if necessary, fail.

Is the consequence that the whole gift must fail? I think it is. The principles to be applied are stated in Tudor on Charities, 5th ed., p. 61. I must read that passage: "If "the gift to charity is residuary upon a void gift, the general "rule is that it fails if the court finds that the precedent gift "is of unascertainable amount. But the charitable gift is "valid if the subject-matter needed for the precedent gift "can be reduced to certainty by means of an inquiry. The "court will not direct an inquiry, and the gift to charity will "fail, if it is manifestly impossible to determine the amount "needed for the primary gift, or if it is clear that there would "be nothing left over after satisfying it." I do not think it can be said here that the subject-matter needed for the precedent "void gift" can be reduced to a certainty by means of the inquiry, and I am fortified in this view by the decision

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(1) [1891] 3 Ch. 252, 259.

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of Eve J. in *In re Porter* (1), where a testator had bequeathed to the trustees of a masonic temple 10,000*l.*, the interest of which was to be applied by the trustees in their full and absolute discretion for the maintenance and upkeep of the temple and the balance, if any, was to be applied in favour of masonic charities. Eve J., after deciding that the tomb cases did not apply, went on to consider the argument that an inquiry should be directed as to the maximum required for the void trust for the maintenance of the temple, and that the sum thus ascertained should be deducted from the 10,000*l.*, the balance being held on trust for the charities. Eve J. rejected this argument, for the reasons which he gives when he says (2): " Then the question is, can I arrive at any conclusion, "either on the evidence before me, or by an inquiry in "chambers, as to the amount of the income necessary to be "applied for maintenance and upkeep and which the trustees, "in the exercise of their discretion, ought not to exceed, and "treating that as all that was intended for the maintenance "and upkeep of the temple and therefore invalid, declare "the surplus to be well settled for charitable purposes? I "feel very great difficulty in adopting any such course. In "my opinion the test to be applied for the solution of this "question is whether the gift of the surplus to charity is a gift "of the whole income, or a gift of what (if anything) will "remain after the void gift has been satisfied. Is the extent "or amount of the primary gift sufficiently defined to enable "the court to ascertain what was intended to be expended "on it? If it is, then although the primary gift fails the "corpus is not affected, and the whole income is applicable "for charitable purposes, but if on the other hand the first "object has not been so defined that the court can fix the "amount required for it then the whole must fail, because "the whole income might be applied for the first object. "Nor do I think it is open to me, as Mr. Vaisey suggests, to "ascertain how much is required for the void object and to "declare the gift of the balance valid. In *In re Birkett* (3), "Sir George Jessel, after stating that the case was a singular "illustration of the way in which our law gets altered, proceeds "as follows: 'I have no hesitation in saying that, if there "' were no authorities, I should feel very little difficulty in "' deciding quite in a different way from that in which I am

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(1) [1925] Ch. 746, 751.

(2) [1925] Ch. 751, 752.

(3) 9 Ch. D. 576.

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"'about to decide. If there were no authorities, I should "'hold, where there is a gift of money upon trust to apply "'a portion of the income for a definite purpose, and then to "'apply the surplus for another purpose, that, if the first "'purpose were sufficiently defined to enable you to ascertain "'the amount of the income that would be required for it, "'and that purpose failed through the gift being invalid, "'the gift of the surplus would be unaffected beyond the "'amount so ascertained.' Then as an instance, he says "that if a man were to give the income of 10,000*l.* a year in "trust in the first place to keep a tombstone in repair, which "could not exceed 20*l.*, and directed the residue of the 10,000*l.* "a year to go to a charity, he should assume that good law "and common sense would concur in saying that the 20*l.* "gift was void, and that the 9980*l.* was well given to charity. "That is what Mr. Vaisey is asking me to do here, to hold "that the gift of what is required for the masonic temple is "void, but that the rest is well given to the charities. But "the Master of the Rolls adds: 'If the first object is not so "'defined that you can reasonably ascertain the amount "'required, the whole must fail, because you might then "'apply the whole of the gift to the first object; and therefore, "'if you could apply the whole of the income properly and "'fairly to the first object, there would, of course, be no "'ascertainable residue.' Authority for that proposition is "to be found in *Chapman* v. *Brown* (1); *Fish* v. *Attorney-"General* (2); and *In re Tyler* (3). On which side of the line "does this particular case fall? The primary purpose of the "gift is the maintenance and upkeep of the temple, and the "whole income is charged with that trust, and as the "expenditure is at the sole discretion of the trustees, they may "properly apply the whole. Is the court entitled to control "this discretion and to define the limits within which the "expenditure ought to be kept? Could it in fact ascertain "with any certainty whether there would be any surplus "or not after providing for this primary object? I do not "think it would be possible. The whole income might be "properly so applied, and if so there would be no available "surplus. It is clear that the testator contemplated that the "whole might be required."

I think that the facts of this case are more like those in

(1) 6 Ves. 404.

(2) L. R. 4 Eq. 521.

(3) [1891] 3 Ch. 252.

In re Porter (1), than those in the hypothetical case put by Sir George Jessel M.R. in *In re Birkett* (2). The obligation as to rebuilding the tomb is not limited to rebuilding out of income, but would require the hospital, if necessary, to have recourse to capital. The void trust might, therefore, involve not only the whole income, but even the corpus. In my judgment, therefore, the gift fails in toto, for it is clear that, on the basis of the conclusion to which I have come, the event in which the gift over was to take effect, namely, the breach of an obligation by the hospital, can never occur.

Solicitors: *Ashurst, Morris, Crisp & Co.; Wilde, Sapte & Co.; E. F. Turner & Sons; Treasury Solicitor.*

(1) [1925] Ch. 746. (2) 9 Ch. D. 576.

J. L. D.

In re FITZWALTER.

WRIGHT *v.* PLUMPTRE.

C. A.
1943
July 22, 29.

Settled land—Tenant for life—Waste—Mine—Mining leases granted by former tenant for life unimpeachable for waste—Present tenant for life impeachable for waste—Apportionment of rents—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 47.

A tenant for life in possession of settled land who is impeachable for waste is not a tenant for life "impeachable for waste in respect "of minerals" within s. 47 of the Settled Land Act, 1925, in respect of the rents paid under mining leases lawfully granted by a predecessor under the Settled Land Act, and he is entitled to three-fourths of the rents even in the case of a mine comprised in the mining leases which had not been opened until after he became tenant for life in possession.

In re Chaytor [1900] 2 Ch. 804 followed.

APPEAL from Simonds J.

By his will, dated November 6, 1861, Brook William Baron Fitzwalter (then Sir B. W. Bridges), after making certain specific devises and bequests, limited and appointed his freehold manors, capital and other messuages, lands, tenements and hereditaments in the counties of Kent and Essex (except as therein mentioned) to the use of his brother, the Rev. B. G. Bridges, and his assigns during his life without impeachment

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of waste, and, in the event (which happened) of his dying without leaving issue, to the use of his sister, Eleanor Plumptre, and her assigns during her life without impeachment of waste, and from and after her decease to her eldest son, John Bridges Plumptre, and his assigns during his life without impeachment of waste, and from and after his decease to the use of his eldest son, Henry Fitzwalter Plumptre (afterwards twentieth Baron Fitzwalter) and his assigns during his life without impeachment of waste, and in the event (which happened) of his dying without leaving issue, to the use of the second and every other son of John Bridges Plumptre and his issue in tail successively according to seniority so that every such son who was or might be born in the lifetime of the testator should take an estate for his life with remainder to his first and every other son successively according to seniority in tail general. The testator died on December 6, 1875, and his brother, Brook George Bridges, died on April 1, 1890. His sister, Eleanor Plumptre, died on January 24, 1892, John Bridges Plumptre having predeceased her, and the twentieth Baron died on September 12, 1932. John Bridges Plumptre had two younger sons, the defendant, Francis Fitzherbert Plumptre, who was born during the life of the testator on March 23, 1864, and George Beresford Plumptre, who died on April 28, 1934, leaving two sons, of whom the defendant, Fitzwalter Brook Plumptre, was the elder. The defendant, F. F. Plumptre, was under a disability and had never been married, and he was (in the circumstances which had happened) tenant for life of the settled estates. A considerable part of the income of the settled estates was derived from mineral rents under mineral leases relating to mines of coal in Kent. These leases had been granted by preceding tenants for life but some of the mines were only opened after the defendant, F. F. Plumptre, became tenant for life. All mining rents and royalties had, since the defendant, F. F. Plumptre, became tenant for life in possession, been paid as to three-quarters to the tenant for life and one-quarter to the trustees of the will as capital money. On November 26, 1942, the trustees of the will took out a summons asking (1.) whether, on the true construction of the testator's will, the defendant, F. F. Plumptre, was impeachable for waste, and (2.) whether, on the true construction of the will and in the events which had happened, the defendant, F. F. Plumptre, was entitled to the whole or three-quarters or one-quarter of the rents and

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royalties payable under the mining leases (1). Simonds J. held, on the first question, that the defendant, F. F. Plumptre, was impeachable for waste, and, on the second question, that, although the mining leases were granted by previous tenants for life who were unimpeachable for waste, the defendant, F. F. Plumptre, was only entitled to one-quarter of the rents and royalties and that there must be an adjustment in respect of past overpayments. The defendant, F. F. Plumptre, appealed.

Geoffrey Cross for this defendant. Even though this defendant is a tenant for life impeachable for waste, he is entitled to enjoy three-quarters of the income derived from mining leases lawfully granted by a previous tenant for life under the powers conferred by the Settled Land Acts. If the mining leases had been granted under powers other than those contained in the Act, a subsequent tenant for life who was impeachable for waste would have been entitled to the whole of the income: *In re Chaytor* (2); and this defendant is not, as regards open mines, "impeachable for waste in respect of "minerals" within the Settled Land Act, 1882, s. 11, a section substantially the same as s. 47 of the Settled Land Act, 1925. See also *Clavering* v. *Clavering* (3). There is no ground for saying that a tenant for life who comes into mines lawfully opened by his predecessor can be required to capitalize more than one-quarter of the rents and royalties: *In re Hall* (4), and that is so though the mines leased by a previous tenant for life unimpeachable for waste are not opened till after the tenant for life impeachable for waste has become entitled: *In re Kerneys-Tynte* (5).

Michael Albery for the defendant, F. B. Plumptre.

In re Chaytor (2) was wrongly decided. In s. 11 of the

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(1) By Settled Land Act, 1925, s. 47: "Under a mining lease, "whether the mines or minerals "leased are already opened or in "work or not, unless a contrary "intention is expressed in the "settlement, there shall be from "time to time set aside, as capital "money arising under this Act, "part of the rent as follows, "namely—where the tenant for "life . . . . is impeachable for "waste in respect of minerals, "three fourth parts of the rent, "and otherwise one fourth part "thereof, and in every such case "the residue of the rent shall go "as rents and profits."

(2) [1900] 2 Ch. 804.

(3) (1726) 2 P. Wms. 389.

(4) [1916] 2 Ch. 488.

(5) [1892] 2 Ch. 211.

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Settled Land Act, 1882, as in s. 47 of the Act of 1925, it was contemplated that a tenant for life impeachable for waste should only receive one-quarter of the rent in all cases. The section has in it the clear words "Whether the mines or minerals "leased are already opened or in work or not" and the use of the words "impeachable for waste in respect of minerals" distinguishes that kind of waste from all other waste. [LORD CLAUSON. *In re Chaytor* (1) has stood unquestioned for forty-three years.] Even so, if, as is contended, the words of s. 47 are clear in making a tenant for life impeachable for waste only entitled to one-quarter of the rents from minerals, they ought to prevail.

Jopling for the Trustees.

Cur. adv. vult.

July 29. LORD CLAUSON read the judgment of the court (LORD CLAUSON, DU PARCQ L.J. and BENNETT J.) The first question is whether the will can be construed to mean that the life estate of Mr. Francis Fitzherbert Plumptre, who was born in the testator's lifetime, namely on March 23, 1864, and became tenant for life in possession on September 12, 1932, is to be without impeachment of waste. It is argued that it would be capricious to differentiate as regards waste between the various tenants for life. No doubt, it would be so, but this argument cannot justify the court in reading into the will words that are not there. Simonds J. was of opinion, and, in my judgment, rightly, that the life tenancy which the present tenant for life takes under the settlement is not limited to him without impeachment of waste.

The next question is what is the extent of the interest of the present tenant for life in the rents and royalties payable under certain mining leases granted by previous tenants for life under the Settled Land Acts. The dates of these leases are not stated in the evidence, but the case was argued on the footing that they are all granted under Settled Land Act powers by previous tenants for life under the settlement. Some of the mines were not worked until after the date when the present tenant for life became tenant for life in possession. It is clear, however, from the express provisions of s. 47 of the Settled Land Act, 1925, that that circumstance does not affect the rights as between capital and income in the rents received under the leases. In any case, where minerals have

(1) [1900] 2 Ch. 804.

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been demised and rent is paid under the demise, that rent forms part of the rents and profits of the settled land: see, as to this, *In re Kemeys-Tynte* (1), and must be dealt with as such, subject, where the minerals have been demised under Settled Land Act powers, to the provisions of s. 11 of the Settled Land Act, 1882, or the equivalent s. 47 of the Act of 1925, whichever may be applicable.

Before dealing with the question of construction which arises under those sections it may be convenient to recall that it is settled law (see *In re Hall* (2) and the cases cited there) that, apart from statutory provisions, a tenant for life who is expressed to be unimpeachable for waste can open and work mines and receive all the profits arising therefrom. If he is impeachable for waste, he cannot open mines, but if the mines in question have been opened by the settlor or by a person interested under the settlement and entitled to open mines, a tenant for life, though impeachable for waste, can continue to work the mines and receive all profits derived therefrom. Accordingly, apart from statutory provisions, the tenant for life in the present case would be entitled to all the profits of the mines in question if they had been lawfully opened by previous tenants for life, and, as explained above, to all the rents payable under mining leases properly granted by such tenants for life. His rights are, however, limited by s. 47 of the Settled Land Act, 1925, mentioned above since the rents and royalties arise from leases granted under Settled Land Act powers.

The question arising in the present case is whether, so far as the mines now in question are concerned, the tenant for life is impeachable for waste in respect of minerals, in which case he is entitled to a fourth only of the income, or if not so impeachable, in which case he is entitled to three-fourths of the income. At first sight the point seems to be simple. Under the settlement, as Simonds J. and we have interpreted it, the tenant for life in question is not unimpeachable for waste, and, as one might well think, accordingly impeachable for waste generally, but this simple construction of the position leads to difficulties when it is borne in mind that, in respect of the mines in question, this tenant for life, but for the Settled Land Acts, would be entitled to all the rents and profits. So far as these mines are concerned he has, apart from this statutory provision, precisely the same right of taking the whole of the profits as if he were unimpeachable for waste. It would seem odd that the legislature, in its anxiety that, where the rents and royalties arise from the exercise of Settled Land Act powers, some portion of the rents and royalties should be capitalized, should, as regards the extent of the capitalization, differentiate between two tenants for life who, apart from the Act, would equally be entitled to retain all the profits in question. It is, on the other hand, perfectly intelligible that where a tenant for life, being impeachable for waste, has no power to open the mines in question except under the statute, he should be allowed a smaller share of the rents and profits of the mines which he opens than a tenant for life who, being unimpeachable for waste, can open mines without aid from the statute, and, if he does so, is entitled to all the profits. This difficulty was faced by the court in *In re Chaytor* (1), where Stirling J. decided that, according to the true construction of s. 11 of the Settled Land Act, 1882, a tenant for life, though not declared by the settlement unimpeachable for waste, is not as regards open mines "impeachable for waste in respect "of minerals" within the meaning of that section. In other words, his lordship construed the words "impeachable for "waste in respect of minerals" as "impeachable for waste "in respect of the minerals which are the subject of the lease "in question." A tenant for life who (but for this special provision as to capitalization) would be entitled to take all the rents of a mineral lease properly granted can obviously not be "impeachable for waste" as regards such minerals. This decision is not binding on us, but we agree with the reasoning on which it is founded, and we are prepared to follow it. We should add that, in any case, we should hesitate to overrule a decision of this character which has stood unchallenged, and, so far as we are aware, uncriticized for forty-three years. Moreover, the decision settled the construction of a section in the Act of 1882 which has been re-enacted by the legislature in the same language (in all material respects) by s. 47 of the Settled Land Act, 1925. The legislature must be taken to have known of the decision. Even if we had doubts as to the correctness of the decision (and we have none), we should feel bound to follow it in construing, as we have to construe, s. 47 of the Settled Land Act, 1925.

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(1) [1892] 2 Ch. 211.

(2) [1916] 2 Ch. 488.

The order of Simonds J. will, accordingly, be discharged, and in lieu of it there will be a declaration that, on the true

(1) [1900] 2 Ch. 804.

construction of the will of the testator, the defendant tenant for life is not unimpeachable for waste, and that he is, nevertheless, entitled to receive as rents and profits of the settled estates the residue of the rents payable under the leases of settled minerals granted under the Settled Land Acts by previous tenants for life after one-fourth part only has been set aside as capital money.

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Appeal allowed.

Solicitors for all parties: *Bridges, Sawtell & Co.*

H. C. G.

KENNEDY *v.* DANDRICK.

MORTON J.
1943
June 29, 30.

Practice—Setting aside judgment on ground of fraud—Action to impeach judgment—Imposition of terms on plaintiff—R. S. C., Or. XXVII., *r.* 15.

Where a party to an action, who duly appeared and delivered a defence, alleges that judgment in that action was obtained against him by the fraud of the other party, he has the right to bring an action to have the judgment set aside, and in such a case Or. XXVII., r. 15, has no application and the court has no jurisdiction to impose on him terms, such as payment of the costs of the previous proceedings or bringing money into court, as a condition of allowing his action to proceed.

Dictum of Lindley M.R. in *Wyatt* v. *Palmer* [1899] 2 Q. B. 106, explained.

PROCEDURE SUMMONS.

In and after 1937 the plaintiff, Kennedy, advanced money to the defendant, Dandrick, on the security of property belonging to Dandrick. In May, 1941, Kennedy, having obtained the leave of the court under the Courts (Emergency Powers) Acts, appointed a receiver of the mortgaged property, who later sold certain chattels on the property. In June, 1941, a dispute having arisen whether or not these chattels formed part of the security, Dandrick began proceedings against Kennedy and the receiver claiming (inter alia) damages for conversion of the chattels sold. Kennedy and the receiver each entered an appearance and put in a defence and the action came on for trial before Morton J. in May, 1942. After Dandrick's case was closed Kennedy and the receiver elected not to call any evidence, and Morton J. gave judgment for

Dandrick and ordered an inquiry as to the damages. The inquiry was referred to an official referee who reported that the value of the chattels in question was 14,100*l.*, and the action was set down for further consideration. On December 4, 1942, the matter came before Uthwatt J. who adopted the report and gave judgment for Dandrick against Kennedy and the receiver for 14,100*l.* and costs. The proceedings on further consideration were not attended by Kennedy or the receiver. Kennedy now brought the present action against Dandrick alleging that he had been induced by the false and fraudulent promises of Dandrick that he would not enforce any judgment which he obtained, to absent himself from the inquiry into damages and the hearing on further consideration, and claiming a declaration that the judgment of Uthwatt J. awarding 14,100*l.* damages and costs against him and the report of the official referee were obtained by the fraud of Dandrick and ought to be set aside. Dandrick took out this summons asking for an order that the plaintiff be put on terms as a condition of proceeding with the action, namely, that he should pay two bills of costs amounting to 314*l.* which Morton J. in May, and Uthwatt J. in December, 1942, had ordered him to pay, and that he should bring into court the sum of 7000*l.*, part of the damages awarded against him.

Lindner for Dandrick. The judgment against Kennedy was obtained by default, since Kennedy did not appear on the hearing of the further consideration of the action and had ceased to contest the case before the judgment was given, and, therefore, Kennedy can be put on terms in the present action: R. S. C., Or. XXVII., r. 15, and Or. XXXVI., r. 33. It was open to Kennedy to apply to have the judgment set aside under Or. XXXVI., r. 33, and he could have obtained an extension of time if necessary. He has chosen to proceed by action and in the circumstances of this case the dictum of Lindley M.R. in *Wyatt* v. *Palmer* (1) that a man who brings an action to set aside a judgment as having been obtained by fraud may be put on terms should be applied: see also Annual Practice, 1943, p. 470, note to Or. XXVII., r. 15. This is a proper case for ordering a payment into court as a condition of allowing such an action to proceed to trial: *Cole* v. *Langford* (2).

Morle for Kennedy. The proper way of setting aside a

(1) [1899] 2 Q. B. 106, 110.

(2) [1898] 2 Q. B. 36.

judgment obtained by fraud is by action: *Cole* v. *Langford* (1); *Jonesco* v. *Beard* (2). Here Kennedy's non-appearance at the hearing on further consideration was induced by Dandrick's fraud. There is no analogy between a judgment obtained by fraud and one obtained by default, and Or. XXVII., r. 15, only applies to cases of default. Therefore, Kennedy cannot be put on terms under that rule. There is no precedent for such an application as the present. The time for imposing terms is when the court decides to set aside a judgment, and not before.

MORTON J. [after stating the facts:] Mr. Lindner, for Dandrick, admits that this is an unusual application. Prima facie, in the absence of any enactment or rule containing some special provision to the contrary, any person is entitled to issue a writ and to proceed with his action without being put on terms to pay money into court or to pay the costs of any previous proceedings. Mr. Lindner seeks to convince me that the court has jurisdiction to accede to his application by referring, in particular, to an observation of Lindley M.R. in *Wyatt* v. *Palmer* (3) and a statement in the Annual Practice, 1943, at p. 470, in a note to Or. XXVII., r. 15. Order XXVII., r. 15, is in the following terms: "Any judgment by default, "whether under this order or under any other of these rules, "may be set aside by the court or a judge, upon such terms "as to costs or otherwise as such court or judge may think fit, "and where an action has been set down on motion for judgment "under r. 11 of this order, such setting down may be dealt "with by the court or a judge in the same way as if judgment "by default had been signed when the case was set down." Prima facie, I should have thought that the rule had nothing to do with the imposing of terms as a condition of proceeding with an action, but the note at p. 470 of the Annual Practice is as follows: "The procedure under this rule does not interfere "with the right to bring an action to set aside a judgment on "the ground of fraud, but if that course is adopted it would "seem that the court could exercise the same power to impose "terms as that provided by this rule." In support of that observation reference is made to *Wyatt* v. *Palmer* (3) and *Cole* v. *Langford* (1).

I can find nothing in *Cole* v. *Langford* (1) to support the observation contained in the Annual Practice. That case decided that where a judgment has been obtained by fraud the court has jurisdiction in a subsequent action brought for that purpose to set the judgment aside, and it has been said by the House of Lords in *Jonesco* v. *Beard* (1): "It has long "been the settled practice of the court that the proper method "of impeaching a completed judgment on the ground of fraud "is by action in which, as in any other action based on fraud, "the particulars of fraud must be exactly given and the "allegation established by the strict proof such a charge "requires." *Wyatt* v. *Palmer* (2) was an action to set aside a judgment on the ground that it had been obtained by fraud, and the defendant applied in chambers that, among other things, a portion of the statement of claim should be struck out unless certain money was paid into court, or secured. After a refusal by Kennedy J. to make such an order, the matter came before the Court of Appeal, and the Master of the Rolls, after saying that an action could be brought to impeach the judgment on the ground of fraud, continued as follows (3): "I am not prepared to say that because there is "a summary method of impeaching that judgment provided "by the rules recourse cannot be had to the old method of "impeaching the judgment by action. The old jurisdiction "of the court is not touched or taken away by the rule in "question. But then there is a subsidiary question. The "rules having provided a short method of getting a judgment "set aside upon such terms as may be just—namely, by an "application in chambers—it is worthy of consideration "whether, if the plaintiff chooses not to avail himself of that "method but to have recourse to the more dilatory method "of bringing an action, he should not be put upon terms. "There is much to be said for that. But it would not be "right in this case to order the money to be paid into court "as a condition of allowing the action to proceed." It is to be observed that that passage does not contain any expression of opinion on this point by the Master of the Rolls. He merely says that a certain matter is worthy of consideration. Having regard to what was said by the House of Lords in *Jonesco* v. *Beard* (1), I have grave doubt whether, even if this case came within the provisions of Or. XXVII., r. 15, the court would have any power to impose the term of payment into court as a condition of allowing Kennedy to proceed with his action. It is not, however, necessary for me to say more than that, for this case does not come within Or. XXVII., r. 15. The judgment which was delivered in the action of *Dandrick* v. *Kennedy* was not a judgment by default within the meaning of that rule. Kennedy had entered an appearance in the action and had delivered a defence.

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(1) [1898] 2 Q. B. 36.

(2) [1930] A. C. 298, 300.

(3) [1899] 2 Q. B. 106.

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(1) [1930] A. C. 298, 300.
(2) [1899] 2 Q. B. 106.
(3) Ibid. 110.

Mr. Lindner has also referred me to Or. XXXVI., r. 33, which is in the following terms: "Any verdict or judgment obtained "where one party does not appear at the trial may be set "aside by the court or a judge upon such terms as may seem "fit, upon an application made within ten days after the "trial; such application may be made either at the assizes "or in Middlesex." It is argued that in the present case Kennedy did not appear at the trial on the action of *Dandrick* v. *Kennedy* within the meaning of that rule. I am prepared to assume in favour of the applicant, Dandrick, that Kennedy might have made an application under that rule within ten days after the trial, but, even so, I do not think that I have any jurisdiction to impose on Kennedy the terms suggested. He did not, in fact, make any application within ten days after the trial, and, according to the allegations in his statement of claim, he did not discover the fraud until after that date. Not having made that application, he has proceeded by writ to attempt to set aside the judgment on the ground that it was obtained by fraud. That proceeding is one which is described in *Jonesco* v. *Beard* (1) as being the proper method of impeaching a completed judgment on the ground of fraud. I am not aware of any enactment, or rule, or general jurisdiction in the court which enables me to say that Kennedy shall not proceed with his action unless he pays the costs already awarded against him in the action *Dandrick* v. *Kennedy* or unless he brings a sum of money into court.

This application must be dismissed, the costs to be the plaintiff's in any event.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Woodham Smith & Borradaile.*

(1) [1930] A. C. 298, 300.

H. L. L.

SIMONDS J.

1943

June 23.

In re HUGHES.

REA *v.* BLACK.

Will—Construction—Name and arms clause—Gift over on "neglect" to take name and arms of testator—Absence of knowledge of condition—Compliance.

By his will, dated January 16, 1858, a testator, who died in 1869, settled certain real estate in strict settlement. The will contained a name and arms clause under which it was directed that the interest of every person who should "neglect" to comply with the conditions contained in it within twelve months of becoming entitled in possession to the property should cease and determine as if he or she were dead without issue. A grandson of the testator, who became entitled in possession to the property in February, 1940, did not become aware of the existence of the name and arms clause within twelve months from that date:—

Held, that, as he had been unable to comply with the condition contained in the name and arms clause through ignorance of its existence, he did not "neglect" to comply with the condition, and, having executed a disentailing deed, was entitled to an assent in respect of the property.

In re Quintin Dick [1926] Ch. 992 applied.

ORIGINATING SUMMONS.

By his will, dated January 16, 1858, George Hughes Hughes devised the Middleton Hall settled estates to trustees for his son, George Pringle Hughes, for life, and after his decease to the use of the first and every other son of his body successively in tail male. He then gave successive life interests, with remainder to their sons in tail male, to his second, third, and fourth sons and his fifth son, Charles Pringle Hughes. In default of the foregoing estates, he gave the property for life estates, with remainder to their respective sons in tail male successively, to his daughters, Jane Elizabeth Hughes, Isabella Margaret Hughes, and three other daughters with divers ulterior limitations. The will then contained the following proviso: "Provided always and my will is that in case the "survivor of my said daughters or her heirs male or any "person who shall become entitled to the said hereditaments "shall not as and when they shall severally become and be "entitled in possession to the said hereditaments assume and "take upon themselves respectively the surname of 'Hughes' "and thenceforth thereafter continue to use the said name "and bear and use the arms which I bear and use and "endeavour to procure the royal licence and authority for so "doing or neglect so to do for the space of twelve calendar "months after they shall severally be so entitled and be of "the age of twenty-one years or upwards then the estate and "interest of him or her or them so neglecting as aforesaid of "and in the said hereditaments shall thenceforth determine "as if he she or they were actually dead without issue." The testator died on November 4, 1869. On the death on February 28, 1940, of Charles Pringle Hughes the property was held in trust for his nephew Archibald George Hughes Black (the son of Isabella Margaret Hughes, who had married Archibald Black and died in 1915), in tail male with divers remainders over. On August 2, 1940, Archibald George Hughes Black, who was living abroad, received information that he was entitled to this interest in the property, but it was not until July 16, 1941 (i.e., more than twelve months after February 28, 1940), that he received the further information that the will contained the name and arms clause. A summons was taken out by the sole personal representative, as to settled land, of the last tenant in tail in fee simple thereof, to determine whether an assent to the property ought to be executed vesting it in Archibald George Hughes Black, having regard to the fact that he had executed a disentailing deed, dated July 25, 1941, whereby the property was disentailed and limited to him in fee simple.

G. D. Johnston for the applicant.

Fawell for Archibald George Hughes Black. The assent should be executed, as there has been no neglect. This condition is different from a condition in which the word used is "fail." "Neglect" connotes the exercise of the will, and, therefore, where there has been no knowledge of the condition, there can be no negligence in omitting to comply with it: see per Romer J. in *In re Quintin Dick* (1); Halsbury's Laws of England, 2nd ed., vol. xxix., p. 792. [He also referred to *In re Watson* (2).]

H. A. Rose for remaindermen. Where the word "neglect" appears alone, its prima facie meaning is "omission" or "failure." No conscious act of volition is implied. In *In re Quintin Dick* (1) "neglect" was used in conjunction with

(1) [1926] Ch. 992, 1006. (2) [1930] 2 Ch. 344.

"refused," and it was in those circumstances that Romer J. held that there had been no forfeiture.

SIMONDS J. [after stating the facts:] The provision in the will with which I have to deal differs materially from the common form clause since it does not contain any direction that the person becoming entitled to the estate shall within a limited time take the name and arms and in default of so doing shall forfeit the estate. There is an unqualified condition that, if the person becoming entitled shall not assume and take the name and arms or shall neglect to do so within a limited time, he shall forfeit his interest. I think that I must construe this somewhat obscure clause as if it were no more than a direction to assume and take the name and arms within the specified time coupled with a gift over in the event of the person who becomes entitled neglecting to do so.

That reduces the question to a somewhat narrow one, namely, in what circumstances a person becoming entitled can be said to have "neglected" to assume and take the name and arms. Does the word "neglect" in its context include every failure to take whether or not the person becoming entitled is aware of the condition on which the benefits can be retained, or does it only apply to the case of a person becoming entitled who is aware of what he must do under the terms of the will to acquire and retain the benefit and then fails to do it? There is a third possibility, namely, whether the word covers the case of a person who ought to know, but does not know, the condition on which he is entitled to acquire and retain the benefit. We are not here concerned with the third possibility, because it cannot be said that the beneficiary ought to have known of the condition. I am, therefore, faced only with the question whether, although he did not know and could not have known of the condition, he, nevertheless, can be said to have neglected to take and assume the name and arms.

The question is not one which I can decide without reference to authority. If I had been free to follow my own inclination, I should have had no hesitation in saying that, just as "negligence," in its legal collocation, implies failure to perform a duty of which the person charged knows or ought to know, so in a document of this kind "neglect" imports failure to do something which the person under the obligation knows or ought to know to be a condition. Am I at liberty to adopt that view? Romer J. reviewed the authorities in *In re Quintin Dick* (1). It was urged before me that the learned judge there had to consider the words "refuse or neglect" and that his decision is binding only where "refuse" and "neglect" are in conjunction, but I cannot ignore the passage in his judgment where, after referring to Warrington J.'s decision in *In re Edwards* (2) he says (3): "If the word "'neglect' connotes the exercise of the will it cannot include "a failure or omission which is due to ignorance of the "provisions of the document, and which, therefore, does not "result from any operation of the mind." As I read that passage, the learned judge was not founding his interpretation of the word "neglect" solely on its conjunction with the word "refuse." He was considering what the word "neglect" would mean if it stood by itself. That view of the decision is, I think, correctly adopted by the learned editor of the second edition of Halsbury's Laws of England (see vol. xxix., p. 792) where he says: "If a condition is expressed to take effect if "the donee shall 'omit' or 'fail' to take the name and arms, "this will cover every case of non-compliance. The word "'refuse,' however, implies a conscious act of volition, so "that a person who was ignorant of the condition or was under "disability cannot be said to have refused to comply with it; "but if a person knows of the existence of the condition, a "refusal need not be express. 'Neglect,' when used alone, "prima facie covers only omissions that are negligent, but "when used in certain contexts it may mean no more than "'fail.' The expression 'neglect or refuse' also implies a "conscious act of volition." There is nothing in the context here which, in my judgment, enlarges that prima facie meaning that "'neglect' when used alone prima facie covers "only omissions that are negligent."

I am, therefore, entitled to hold, in accordance with what would have been my own unguided opinion and consistently, as I think, with the judgment of Romer J. in *In re Quintin Dick* (1), that in the present case "neglect" does not cover every case of failure but only that case where the person, acting consciously, omits to do that which he ought to do as a condition of receiving the testator's bounty. Accordingly, I hold that Archibald George Hughes Black did not, within the meaning of the will, neglect to assume and take the name of "Hughes," and, therefore, that he was competent to execute the disentailing assurance which he did on July 25, 1941, the result being that the applicant ought to execute in his favour the necessary assent.

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(1) [1926] Ch. 992.

(2) [1910] 1 Ch. 541.

(3) [1926] Ch. 1006.

Solicitors: *Robinson & Bradley, for Charles Percy & Son, Alnwick.*

J. L. D.

SIMONDS J.
1943
July 2.

In re HODGE.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* MORRISON.

Will—Construction—Annuity—Acceleration—Provision for payment after death of tenant for life—Disclaimer by tenant for life of interest under will.

A testatrix by her will directed that annuities should be paid to two annuitants subject to a life interest in the residuary income, the first payments to be made three months after the death of the tenant for life. The tenant for life having disclaimed his life interest:—

Held, that the annuities were accelerated so as to take effect as from the death of the testatrix.

ADJOURNED SUMMONS.

By her will, dated December 17, 1935, Emily Madge Hodge appointed Midland Bank Executor and Trustee Co., Ld., executor and trustee thereof, and by cl. 6 she directed as follows: "subject to the life interest given to Sir Rowland "Frederick William Hodge Baronet [hereinafter called 'the "'tenant for life'] as hereinafter mentioned I bequeath the "following annuities: (*a*) to the said Mrs. Ethel Zoe Morrison "an annuity of 50*l.* during her life to be paid to her free of "all deductions but not of income tax by equal quarterly "payments the first whereof shall be made three months after "the death of [the tenant for life]: (*b*) To the said Mrs. Dora "Valentine Jarvis an annuity of 50*l.*" in the same terms as the previous annuity. She further directed the bank to pay the income of her residuary estate to the tenant for life during his life and after his death "upon trust to provide for the "legacies and annuities before bequeathed by this my will "and subject thereto upon trust as to both capital and income" for the persons therein mentioned. The testatrix died on July 9, 1942. By a deed of disclaimer, dated April 12, 1943, the tenant for life disclaimed the life interest given to him by the will. The bank took out a summons to determine the question whether, having regard to the disclaimer, the two annuities were payable as from the death of the testatrix.

G. D. Johnston for the bank.

Belsham for the annuitants. The annuities are accelerated and are payable as from the death of the testatrix. There is nothing in the will depriving the annuitants of the benefit of the rule that, where a life interest has been defeated because the tenant for life refuses or cannot take the benefit of that life interest, any future interests are accelerated. [He referred to Jarman on Wills, 7th ed., vol. ii., p. 700, and *Jull* v. *Jacobs* (1).]

Stranders for persons interested in the residue. There is no authority to support the contention that the annuities should be accelerated. There is a clear direction in the will that the first payments shall be made three months after the death of the tenant for life.

J. A. Reid for infants also interested in the residue. To provide for the annuities an annuity fund must be appropriated, the income of which falls back into residue until the annuities become payable. Even if, in view of the disclaimer, the annuities would otherwise be accelerated, the direction as to payment three months after the death of the tenant for life shows a contrary intention and does away with any question of acceleration.

H. A. Rose for the tenant for life.

SIMONDS J. [after stating the facts:] The principle of acceleration was first established in regard to remainders in real estate, and probably the origin is to be found in the technicalities of real property law. However that may be, the principle became extended to interests in personalty, and, although counsel have not found any authority where it has been applied except in the case of what may be called a residuary interest, I see no reason why it should not be appropriate in the case of any interest, whether partial, such as an annuity, or residuary. The principle is the same. An

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(1) (1876) 3 Ch. D. 703.

SIMONDS J.
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interest is postponed that a prior interest may be enjoyed. If that prior interest is determined, whether by the death of a prior beneficiary or for any other cause, the reason for postponement disappears and there is no reason why there should not be acceleration. Accordingly, when I find an annuity expressed to be subject to a life interest and that the tenant for life has disclaimed his life interest, I come to the conclusion that the annuity is to be accelerated, for it is just as if the direction for the payment of the annuity was "subject to the interests of the tenant for life which may be "determined either by his death or for some other reason."

A special difficulty in the present case arises from the direction that the first payment of each annuity is to be made three months after the death of the tenant for life, but that is merely an administrative provision which follows on the gift of the annuity expressed to be subject to his life interest. I must, I think, interpret that as meaning no more than "three months after the death of the tenant for life or other "determination of his interest," and for this purpose his disclaimer is equivalent to the determination of his interest. Accordingly, I am of opinion that these annuities are accelerated and run from the death of the testatrix, and that the first payment became due three months after her death.

Solicitors: *Alfred Neale & Co.; Stoneham & Sons; Wrinch & Fisher, for Murton, Clarke & Murton-Neale, Cranbrook.*

J. L. D.

SIMONDS J.
1943
July 6.

In re MAYO.

MAYO *v.* MAYO.

Will—Statutory trust for sale—Refusal by trustees to sell—Order directing trustees to give "effect to proposed transaction"—Such order as court thinks fit—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 30.

Two of the trustees of a will, who were also trustees for the purposes of the Settled Land Acts, refused to concur with the remaining trustee in exercising the statutory powers of sale on which certain freehold property was held. The remaining trustee took out a summons under s. 30 of the Law of Property Act, 1925, for an order directing his co-trustees to concur with him in offering the property for sale in such manner as the court should think fit:—

Held, that the judicial discretion conferred on the court by

s. 30 of the Law of Property Act, 1925, on an application of this kind "to make such order as it thinks fit" must be exercised in the same way as the discretion which is exercisable by the court in the case of an instrument containing an express trust for sale and a power of postponement, and that the two trustees must be directed to concur with the remaining trustee in taking the necessary steps for the sale of the property.

ADJOURNED SUMMONS.

By his will, dated April 18, 1932, the testator, John Harrison Mayo, having appointed his son, Alfred Harrison Mayo, his daughter, Gertrude Mary Mayo, and Maurice Frederic Carter, executors and trustees thereof and trustees for the purposes of the Settled Land Acts, devised freehold property to them on trust to pay to his wife, Laura Mayo, for her life the rents and profits arising therefrom and from and after her decease to hold on trust for his son and daughter in undivided shares. The testator died on February 21, 1936, and his widow died on March 26, 1939. The testator's son requested his co-trustees to exercise the statutory powers of sale on which the property was held, but they refused to do so, and he took out a summons for an order under s. 30 of the Law of Property Act, 1925 (1), directing his co-trustees to concur with him in offering the property for sale by auction in such manner and on such terms as the court should think fit.

W. G. H. Cook for the testator's son. The property is held on the statutory trusts for sale prescribed by s. 36 of the Settled Land Act, 1925, and, in view of the absence of unanimity among the trustees, the trust for sale should be enforced immediately. [He referred to *In re Hilton* (2) and *In re Ball* (3).] The effect of s. 30 of the Law of Property Act, 1925, is to confer on the court a discretion which is exercisable in the same way as the discretion which arises when an instrument contains an express trust for sale.

Pennycuick for the trustees. By giving the court a discretion to make such an order as it thinks fit, s. 30 of the

(1) By s. 30 of the Law of Property Act, 1925: "If the "trustees for sale refuse to sell ". . . . any person interested may "apply to the court for a vesting "or other order for giving effect "to the proposed transaction or "for an order directing the "trustees for sale to give effect "thereto, and the court may make "such order as it thinks fit."

(2) [1909] 2 Ch. 548.

(3) [1930] W. N. 111.

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Law of Property Act, 1925, does not impose an obligation on the court to order the trust for sale to take effect immediately. The court would be justified in ordering a postponement of the sale. The discretion, conferred by the section, is an absolute discretion to order a sale or not to do so, according to the circumstances. [He referred to Halsbury's Laws of England, 2nd ed., vol. xxiv., p. 380.] In *In re Roth* (1), the court was dealing with a gift of personalty. The present case has to do with realty, and the court may take the view that in those circumstances a different view should be taken and a sale not ordered.

SIMONDS J. [after stating the facts:] The result of the residuary devise, having regard to the provisions of s. 36 of the Settled Land Act, 1925, was that the property was held on trust for sale, but, superadded to that trust, there is a statutory power of postponement. It appears to me that the judicial discretion conferred by s. 30 of the Law of Property Act, 1925, must be exercised in the same way as the discretion which is exercisable by the court in the case of an instrument containing an express trust for sale. The trust for sale will prevail, unless all three trustees agree in exercising the power to postpone. The principle is established by *In re Roth* (1), and *In re Hilton* (2). Here there is no suggestion of mala fides on the part of the testator's son, who claims that the sale should not be postponed. If that were established, the position would be different, but in the present case I think that the son is reasonable in asking for the property to be sold. It has been urged that the same considerations should influence the court as those by which it would have been influenced before 1925 on applications under the Partition Acts. I do not think that the analogy is in any way of assistance. Here there is an express trust for sale imposed by the statute with a power to postpone the sale. I cannot exercise the discretion in any other way than I should have exercised it if there had been an express trust for sale, with a power of postponement, in the will. I must direct the trustees to concur with the testator's son in taking all necessary steps for the sale of the property.

Solicitors: *Wright & Bull, for Franklin & Jones, Gloucester; Blyth, Dutton, Hartley & Blyth, for M. F. Carter, Newnham.*

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(1) (1896) 74 L. T. 50.

(2) [1909] 2 Ch. 548.

In re D. (AN INFANT).

BENNETT J.

1943
July 9.

Infant—Alien—Guardian—Appointment—Infant without property.

An infant, who was an alien, was brought to England in July, 1939, by a philanthropic society, his parents remaining abroad. The infant had no property of his own within the jurisdiction of the court and no such property had been settled on him, which the court was asked to administer. On an application made to the court by his next of kin by originating summons for the appointment of a guardian:—

Held, that the court had power to appoint a guardian, as the jurisdiction was not based on the existence of property, but on the infant's need of protection.

Johnstone v. *Beattie* (1843) 10 Cl. & F. 42, 145; *Nugent* v. *Vetzera* (1866) L. R. 2 Eq. 704, applied.

ADJOURNED SUMMONS.

In July, 1939, a society, known as "The Movement for "Care of Children from Germany," brought an infant to this country at the request of the Council for German Jewry and of two of the infant's relatives, an aunt and her husband. The infant, who was not a British national, was placed at a hostel, as the relatives, who had themselves come to England as refugees from Nazi oppression and also were not British nationals, were unable to maintain him. The infant had no property within the jurisdiction of the court and no such property had been settled on him which the court was asked to administer. In January, 1943, the relatives obtained possession of the infant, whose parents were thought to be alive and in a concentration camp in Italy, and failed to return him to the hostel. An originating summons was taken out on his behalf by his next of kin for an order appointing a guardian or guardians of his person during his minority or until further order, and the question arose whether the court had jurisdiction to make such an order.

Vaisey K.C. and *I. M. Phillips* for the applicant. The court has power to appoint a guardian where the infant is in need of protection (see Halsbury's Laws of England, 2nd ed., vol. xvii., p. 586), although the infant is not a ward of court and has no property within the jurisdiction: see *In re McGrath* (1); *In re Spence* (2). The clearest statement of this jurisdiction is to be found in the speech of Lord Langdale

(1) [1893] 1 Ch. 143.

(2) (1847) 2 Ph. 247, 252.

in *Johnstone* v. *Beattie* (1). The court has power to appoint a guardian of alien infants: see *Nugent* v. *Vetzera* (2). [He also referred to Halsbury's Laws of England, 2nd ed., vol. xvii., p. 695, and *In re Willoughby* (3).]

Donald Cohen for the relatives. It is not disputed that the court has jurisdiction to appoint a guardian, but there may be some difficulty owing to the fact that the infant is an alien. [He referred to *Brown* v. *Collins* (4).]

BENNETT J. The question for determination is whether the court has jurisdiction to appoint guardians of infant children who have no property of their own within the jurisdiction of the court and no such property settled on them which the court is asked to administer. I am satisfied by the authorities that in such a case the court has jurisdiction to appoint a guardian. I was somewhat puzzled at first because of the well-established practice of making a nominal settlement on an infant when it is desired to make that infant a ward of court, with the result that the existence of property which the court is asked to administer seemed to be the foundation of the court's jurisdiction to appoint a guardian of the infant. I am, however, now satisfied that the jurisdiction is based, not on the existence of property in which the infant is interested and which the court is asked to administer, but on the infant's need of protection.

I think that the matter is best stated in the following passage which is to be found at the beginning of the speech of Lord Langdale in *Johnstone* v. *Beattie* (1): "Amidst the "differences of opinion which exist in this case, it is satisfactory "to me that no doubt is thrown upon the jurisdiction of the "Court of Chancery to appoint guardians for any infant "residing in England. The whole property of an infant may "be situate in a foreign country, and tutors and curators of "the person and estate of the infant may have been duly "appointed according to the law of the country where the "property is; and yet it may be evident that, without the "authority of a guardian duly appointed here, and subject "to the control of the Court of Chancery, the infant may be "without the protection which may be absolutely necessary "for its welfare, and even for its safety. The jurisdiction "being indisputable, the exercise of it in particular cases

(1) (1843) 10 Cl. & F. 42, 145.
(2) (1866) L. R. 2 Eq. 704.
(3) (1885) 1 T. L. R. 480.
(4) (1883) 25 Ch. D. 56.

"becomes a matter of discretion and expediency, depending "on the peculiar circumstances of each case . . . ." Lord Langdale's words constitute the authority on which I propose to act. The fact that the infant is a foreign subject seems to me to be irrelevant if the foundation of the jurisdiction is the need of the infant to be protected. The fact that the infant is a foreign subject does not make it unnecessary to protect him, and the jurisdiction to appoint a guardian of an infant who is not a British subject is established by the decision of Wood V.-C. in *Nugent* v. *Vetzera* (1).

As an instance of the exercise of the jurisdiction to appoint guardians in a case where an infant is without property, I have been referred by Master Holland to an order made by Clauson J., sitting in chambers, by which he appointed guardians of an infant whose widowed mother was out of the country. The infant was to be educated at a school in England the authorities of which insisted that there should always be a guardian, resident in England, of every pupil at the school. The order made by Clauson J., on an application by an originating summons, which asked for the appointment of a guardian, was to appoint two persons to act jointly with the mother as guardians of the infant for such time as the infant should be a pupil at the school. That order seems to me to be a clear instance of the exercise of the jurisdiction which I am asked to exercise and to support the opinion which I have formed that this court has jurisdiction in a proper case to appoint a guardian of the person of an infant although he has no property of his own. In the present case there are circumstances which make it desirable that a guardian of the person of this infant should be appointed.

Solicitors: *Edward F. Iwi; Adler & Perowne.*

J. L. D.

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(1) L. R. 2 Eq. 704.

BENNETT J.

1943 July 1.

LEICESTER PERMANENT BUILDING SOCIETY *v.* BUTT.

Mortgage—Receiver—Account—Appointment by mortgagee—Duty to account to mortgagee—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 109, *sub-s.* 8 (*iv.*), (*v.*).

A mortgagee who has appointed a receiver under his mortgage is within the class of persons for whose benefit and protection there is imposed on the receiver, by s. 109, sub-s. 8 (iv.) and (v.), of the Law of Property Act, 1925, the duty of applying money received by him in payment of the interest accruing due in respect of any principal money due under the mortgage and in or towards discharge of the principal money if so directed in writing by the mortgagee. If, therefore, the receiver refuses to account to the mortgagee for moneys coming to his hands, the mortgagee can maintain an action against him for an account.

Groves v. *Lord Wimborne* [1898] 2 Q. B. 402, applied.

Liverpool Corporation v. *Hope* [1938] 1 K. B. 751, distinguished.

ADJOURNED SUMMONS.

The plaintiff society were mortgagees under four mortgages which were all executed before September 3, 1939. In the case of each mortgage the statutory power to appoint a receiver had arisen, and the society, having obtained leave under the Courts (Emergency Powers) Act, 1939, appointed the defendant, by four instruments in writing, to be receiver under all four mortgages. Each appointment contained a direction, in accordance with s. 109, sub-s. 8 (v.), of the Law of Property Act, 1925 (1), to apply any ultimate surplus of moneys received by the receiver towards discharge of the principal moneys secured by the mortgages. The defendant acted as receiver for a considerable time but, although he was requested to account for his receipts as receiver and although he did not deny that he was bound to do so, he failed to account to the society. On April 6, 1943, the society issued a writ against him by which they claimed an account of the rents and profits and income of the property comprised in each mortgage received by him and payment of what was found due. The defendant not having entered an appearance, a summons was issued under R. S. C., Or. xv., r. 1, for a summary account. The summons came before the judge in chambers and was adjourned into court for argument.

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(1) By s. 109, sub-s. 8: "Subject "to the provisions of this Act as "to the application of insurance "money, the receiver shall apply "all money received by him as "follows, namely . . . . (iv.) In "payment of the interest accruing "due in respect of any principal "money due under the mortgage; "and (v.) In or towards discharge "of the principal money if so "directed in writing by the "mortgagee; and shall pay the "residue, if any, of the money "received by him to the person "who, but for the possession of "the receiver, would have been "entitled to receive the income of "which he is appointed receiver, "or who is otherwise entitled to "the mortgaged property."

W. F. Waite for the society. A mortgagee must be entitled to an account from a receiver whom he has appointed because, by s. 109, sub-s. 8, of the Law of Property Act, 1925, a statutory duty is imposed on the receiver to apply the income of the property in certain ways, one of which is stated in s. 109, sub-s. 8 (iv.), to be the payment of the interest accruing due in respect of the principal money, and another of which is stated in s. 109, sub-s. 8 (v.) to be to discharge the principal money if so directed in writing by the mortgagee. These statutory duties are for the benefit of both mortgagor and mortgagee and, therefore, confer a right of action on both: *Groves* v. *Lord Wimborne* (1); *Woods* v. *Winskill* (2); see also *Liverpool Corporation* v. *Hope* (3), where the principle of *Groves* v. *Lord Wimborne* (1) was accepted although it was not applied. The legislature cannot have intended that a receiver appointed by a mortgagee should be able to defy the mortgagee and to claim that he is responsible only to the mortgagor.

BENNETT J. The proposition of law on which this claim is based is that a person who is interested in the performance of a statutory duty may maintain an action for breach of it against a person who is made liable by the statute to perform it. The authority on which that proposition is advanced is the following passage from the judgment of Vaughan Williams L.J. in *Groves* v. *Lord Wimborne* (1): ". . . . It cannot be "doubted that, where a statute provides for the performance "by certain persons of a particular duty, and some one "belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to "perform it, prima facie, and, if there be nothing to the "contrary, an action by the person so injured will lie against "the person who has so failed to perform the duty." That principle has been followed and applied, in particular, by

(1) [1898] 2 Q. B. 402.
(2) [1913] 2 Ch. 302.
(3) [1938] 1 K. B. 751.

BENNETT J.

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LEICESTER PERMANENT BUILDING SOCIETY v. BUTT.

Astbury J. in *Woods* v. *Winskill* (1) against a receiver and manager appointed by debenture holders who had neglected to perform the statutory duty of paying preferential creditors. Mr. Waite called my attention to *Liverpool Corporation* v. *Hope* (2) where the Court of Appeal held that an action brought by a local authority against a receiver to recover unpaid arrears of rates would not lie. Slesser L.J. said (3): "It is "said that there is here a breach of statute. It has been "decided in many authorities, of which the case of *Groves* v. "*Lord Wimborne* (4) is perhaps the leading one, that in "appropriate cases where a person does suffer damage by "reason of breach of a statutory duty by another he may "recover those damages in an action; but this principle is "wholly inapplicable to the present case, for the very good "reason that there is no statutory duty on Mr. Hope, the "receiver here, the breach of which could in any conceivable "circumstances give a right to damages to the local authority, "the Liverpool Corporation." In other words, Liverpool Corporation were not persons who belonged to a class of those for whose benefit and protection the statute imposed the duty. That case seems to me to be wholly distinguishable from the present case where the plaintiff society, in my judgment, are clearly among the class of persons for whose benefit and protection a statutory duty was imposed by s. 109 of the Law of Property Act, 1925. For these reasons, it is open to the plaintiff society on the facts proved to maintain an action against the defendant, and, accordingly, I make an order in accordance with the terms of the summons. The costs of the summons will be costs in the action.

Solicitors: *Field, Roscoe & Co., for A. H. Pollard, Leicester.*

(1) [1913] 2 Ch. 302, 307.
(2) [1938] 1 K. B. 751.
(3) Ibid. 755.
(4) [1898] 2 Q. B. 402, 415.

K. R. A. H.

In re JOEL.

ROGERSON *v.* JOEL.

C. A.

1942

Dec. 9.

1943

Mar. 10, 11; June 9; July 5.

Revenue—Estate duty—Testator killed in war—Remission of duty—Computation—Apportionment of remission—Finance Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 15), *s.* 44—*Finance Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 21), *s.* 38.

Will—Bequest of house together with contents—Single gift.

The remission of estate duty given by the Finance Act, 1900, s. 14, as extended by the Death Duties (Killed in War) Act, 1914, s. 1, the Finance Act, 1918, s. 44, and the Finance Act, 1924, s. 38, in respect of property passing to specified relatives on the death of a person meeting his death on war service enures (when he has made a will dealing with his property and has given no direction to the contrary) for the benefit of his residuary legatees as the persons on whom the burden of estate duty has fallen, even though some or all of the residuary legatees are not specified relatives. This applies not only to the testator's own real and personal estate, but also to property over which he exercises a general power of appointment by his will.

A bequest of a leasehold house " together with its contents " is a single gift and not two separate gifts, and the legatee may not disclaim the gift of the house and retain its contents.

The statements of Cotton and Lindley L.JJ. in *In re Hotchkys* (1886) 32 Ch. D. 408, 418, 419, commenting on *Syer* v. *Gladstone* (1885) 30 Ch. D. 614, to the effect that the gift of a house and of chattels in it were two separate gifts, not followed.

APPEAL from Farwell J. (1).

By his will, dated October 1, 1939, the testator, Dudley Jack Barnato Joel, after appointing his executors and making a large number of specific bequests, including bequests to his brother, Stanhope Joel, and to his sisters, Eileen Rogerson and Doris Walter, devised free of duty his "house at 74 Brook "Street together with the contents," except such as he had specifically bequeathed, to his sister, Eileen Rogerson. He then gave a number of pecuniary legacies, all free of duty, including a legacy of 10,000*l.* to Doris Walter, and legacies of 500*l.* each to two nieces. After the testator had made charitable and other legacies not material to be mentioned, cl. 9 of the will provided: "Subject to the payment of my "funeral and testamentary expenses death duties debts and "legacies I devise and bequeath all the real and personal "estate not hereby . . . . otherwise specifically disposed of

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(1) [1942] W. N. 160.

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"and which I can dispose of by will in any manner I think "proper either as beneficially entitled thereto or under any "general power . . . . as to two fifth parts thereof to my said "brother Stanhope Henry Joel Joel as to another two fifth "parts thereof to my said sister Eileen Rogerson and as to "the remaining one fifth part thereof to Gerald Oldham my "late wife's brother's eldest son absolutely." The testator had a general power of appointment over a settled share of the residuary estate of his father. The testator died on May 28, 1941, on war service while serving in the Navy as a temporary Lieutenant R.N.V.R. The Treasury thereupon remitted the death duties as provided by s. 14, sub-s. 1, of the Finance Act, 1900 (1), and the Acts amending it. On January 20, 1922, the executors of the testator (other than Stanhope Joel, took out a summons to have it determined (inter alia) (1.) whether, in ascertaining the beneficial shares in the testator's residuary estate, there should be credited in equal shares to the shares therein of the defendants, Stanhope Joel and Eileen Rogerson, the amount of the estate duty otherwise payable on the testator's death in respect of his estate which had been remitted by reason that the testator was killed in the present war (other than the estate duty so remitted on the specific or pecuniary gifts to relatives of the testator other than the said two defendants), or whether the remission of duty enured for the benefit of the three residuary legatees in proportion to their shares in the residuary estate; and (2.) whether the defendant Eileen Rogerson was entitled to disclaim the bequest of the leasehold house, 74 Brook Street, and to accept the bequest of the contents thereof. Farwell J.

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(1) By the Finance Act, 1900, s. 14, sub-s. 1, the Treasury was given power, in the case of a sailor or a soldier [or an airman] who had died while on active service against an enemy, to remit part of the death duties "leviable in respect of property "passing upon the death of the "deceased to his widow or lineal "descendants."

By s. 1, sub-s. 1, of the Death Duties (Killed in War) Act, 1914, the remission was extended to "property passing to lineal "ancestors as well as to property "passing to the widow or lineal "descendants," and increased the amount of the remission.

Section 44 of the Finance Act, 1918, extended the remission to property passing to brothers and sisters and the descendants of brothers and sisters of the deceased.

By s. 38 of the Finance Act, 1924, all such relief as might have been given under the above sections was to be given in extended cases where the requisite recommendation had been made.

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held, in answer to question (I.), that to the beneficial shares in the testator's residuary estate of the defendants, Stanhope Joel and Eileen Rogerson, there should be credited in equal shares the amount of the estate duty remitted, without prejudice to the question whether that applied to the estate duty on the value of specific and pecuniary legacies to relatives other than those two defendants; and, in answer to question (2.), that the house and its contents were separate and independent gifts: *In re Lysons* (1); so that the legatee could disclaim the one without disclaiming the other. Gerald Oldham appealed. When the appeal was being opened, it was adjourned that the Inland Revenue Commissioners might be invited to appear and support the principles on which remission had been calculated. After the appeal had been heard and judgment reserved, it was announced that the court was of opinion that the remission had been calculated on the right principles and on June 9, 1943, the parties were given a further opportunity of argument in regard to the proper apportionment of the remitted estate duty, a legatee other than one of the residuary legatees in respect of whose legacy a remission of estate duty had been made being added to argue the question left open by Farwell J.

Roxburgh K.C. and *Geoffrey Cross* for Gerald Oldham.

J. H. Stamp for the Commissioners of Inland Revenue. The relief from estate duty is given by the Finance Act, 1924, s. 38, which relates back to the Finance Act, 1900, s. 14, and the amending Acts. The extent of the relief granted is laid down in the Death Duties (Killed in War) Act, 1914, s. 1. The Inland Revenue Commissioners adopted the principle of granting remission of estate duty in respect of so much of the total estate as sufficed to provide all the benefits given by the will to the specified relatives and in respect of that sum estate duty on 5000*l.* is totally remitted under s. 1, sub-s. 1 (*a*), of the Act of 1914, and the proportion of the duty on the surplus laid down in s. 1, sub-s. 1 (*b*), is also remitted. The Commissioners do not consider themselves to be concerned with the distribution of the amount remitted which goes in accordance with the deceased's will, apart from the express provisions in s. 1, sub-s. 2, as to the first 5000*l.* But it is suggested that the sub-section is not made applicable by s. 38 of the Act of 1924, as it refers only to the relief to be given.

(1) (1912) 107 L. T. 146.

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[Lord Greene M.R. The whole object is to relieve the widow and other relatives of the specified degrees from the burden of duty and for that purpose regard must be had to sub-s. 2.]

The effect of the Act is to increase the amount of the estate. It is not as if notional additions were made to the interests of the specified relatives. The addition is to the estate as a whole. The remission of estate duty is not to the specified relatives but to the man who died for his country. It is only the amount of the relief that is calculated by reference to the shares in the estate of the specified relatives. That the remission operates only for the benefit of residuary legatees who may not be relatives of the deceased is immaterial. It is true that in s. 14, sub-s. 1, of the Finance Act, 1900, the remission is stated to be in respect of "death duties . . . . leviable in respect of "property passing upon the death of the deceased to his widow "or lineal descendants" but that does not mean that remission is only to be granted where the specified relatives benefit: see as to the use of that expression s. 5 of the Finance Act, 1894. The whole effect of the various sections is to reduce the charges on the estate and to leave the estate so increased to be distributed. The pecuniary legatees having paid no part of the duty on the bequests to them and all estate duty having been paid out of the residuary estate, the residuary estate alone benefits from the remission.

Roxburgh K.C. and *Geoffrey Cross* (after supporting the contention of the Inland Revenue Commissioners). On this view the whole remission goes to the residuary estate on which the burden of the duty falls. The proper policy is to compute the remission at the time the estate duty is paid and before the amount of the residuary estate is calculated. That increased residuary estate then goes to the three residuary legatees in the proportions provided for. There are really three views, (1.) that as a specific or pecuniary legatee pays no duty no remission ought to be made of duty in respect of their interests, (2.) that there ought only to be a remission as to four-fifths which would go to the residuary legatees who are specified relatives, and (3.) that the remission goes into residue and is divisible among all the residuary legatees. The first two views would presuppose that the revenue authorities had made the remission on the wrong basis and that is not so.

Sect. 38 of the Act of 1924 does not incorporate s. 1, sub-s. 2, of the Act of 1914. This is vital because if it did, the sub-section would have to be construed. It may well be that it had been found to serve no useful purpose and was not therefore incorporated by s. 38. There is nothing in the relevant legislation which has any bearing on the allocation of benefit, unless it is this sub-section. There is nothing to suggest that a legatee who bore no part of the burden of estate duty should receive a benefit, and in the absence of some direction to the contrary by the testator the whole benefit of the remission must go to the residuary estate. So, too, there is no logical reason why the two residuary legatees who were specified relatives of the testator should take the whole benefit either of the free personalty and realty or the property over which the testator had a general power of appointment. The gift of all these was made subject to payment of death duties and that can only mean subject to the net amount of death duty payable on the property passing at the testator's death. The effect, therefore, of the remission of part of the estate duty is to increase the amount of net residue divisible among the three residuary legatees. The only reason for which any distinction can be made as to property appointed under a general power is that the duty is a charge on that property and that the gift of residue is made "subject to the payment of my . . . . death "duties." But it is submitted that this makes no difference. The residuary estate must be regarded as a whole.

[They referred to *In re Dr. Barnardo's Homes National Incorporated Association* (1) and *In re Harland-Peck* (2).]

On the second question Farwell J. was in error in deciding that a bequest of a leasehold house "together with the contents" constituted two separate gifts. He so held on the authority of *In re Lysons* (3), but it is contended that that case was wrongly decided. This was a gift of onerous and profitable property aggregated in one gift. For this purpose there are no stronger words than "together with." Joyce J. in *In re Lysons* (3) thought there was a single gift but felt bound by *Syer* v. *Gladstone* (4) and *In re Hotchkys* (5). *Syer* v. *Gladstone* (4) is distinguishable, for "and" is far weaker than "together with," which goes further to show an intention to aggregate. The real difficulty is caused by remarks of Cotton and Lindley L.JJ. in *In re Hotchkys* (5). The facts of *Syer* v. *Gladstone* (4) are given more fully in *In re Baron*

(1) [1921] 2 A. C. 1, 11.
(2) [1941] Ch. 182.
(3) 107 L. T. 146.
(4) (1885) 30 Ch. D. 614.
(5) (1886) 32 Ch. D. 408.

Kensington (1). What was said by the Court of Appeal in *In re Hotchkys* (2) is not enough to cause the court not to hold that this is an aggregate gift.

Harman K.C. and *F. Grant* for a specified relative who was a pecuniary legatee not interested in residue. The idea of relieving soldiers from death duties is as old as 55 Geo. 3, c. 84, and was continued as regards a common soldier dying in the service of the King by the Finance Act, 1894, s. 8. The granting of relief in respect of specified relatives of officers started only in 1900. It would be useless to remit duty with reference to specified relatives if they were not to benefit. The object must be to give a solatium to those persons. As to the first 5000*l.*, s. 1, sub-s. 2, of the Act of 1914 provides that the remission shall go to the person who would have borne the duty. It is a fair inference that for any amount above the first 5000*l.*, the remission was to go to the specified relatives by way of an additional legacy. The legislature should have so provided if the intention was that the whole remission should go exactly as laid down in regard to the remission on the first 5000*l.*

Charles Romer K.C. and *Hillaby* for Stanhope Joel and Mrs. Rogerson. The gradual enlargement of the favoured class of relatives leads to an almost irresistible inference that they alone are to benefit from the remission of duty: see in this connexion the Death Duties (Killed in War) Act, 1914, s. 1, sub-s. 3, and s. 64, sub-s. 2, of the Finance Act, 1940. May it not be that only so much duty should be remitted as would otherwise fall on specified relatives? On that view it would be the four-fifths of the residue given to specified relatives that would benefit from the remission and the appellant would get nothing.

On the view advanced for the Crown, it could not be argued that as regards the property (other than that in respect of which the testator exercised a general power of appointment) the remission would not be divisible among the three residuary legatees. So far as the appointed fund is concerned the duty on it is a charge on the property which does not pass to the executors as such although they are bound to pay it: *O'Grady* v. *Wilmot* (3). Therefore the proper proportion of the charge is attributable to each share of residue and the remission is of the duty attributable to the shares of the specified relatives.

(1) [1902] 1 Ch. 203, 211 (*n*).
(2) 32 Ch. D. 408.
(3) [1916] 2 A. C. 231.

There is no remission in regard to the appellant's one-fifth share and he does not benefit. If the charge on a share of the appointed fund is reduced for reasons personal to him, that must surely be for his benefit. Nothing in the form of the gift of residue in cl. 9 of the will can affect this. [They referred to *In re Hicklin* (1).]

On the second question the legatee, Mrs. Rogerson, is entitled to take the contents of the leasehold property without that property. In fact the contents had been removed from the house before the testator's death and he used words in his will which show that he had this in contemplation in case of war. That being so the gift of furniture must be regarded as a separate gift. Reliance is placed on *In re Lysons* (2) and what was said by the Court of Appeal in *In re Hotchkys* (3).

Droop for the executors other than Stanhope Joel.

Roxburgh K.C. replied.

Cur. adv. vult.

1943. July 5. LORD GREENE M.R. read the following judgment of the court (LORD GREENE M.R., LUXMOORE and GODDARD L.JJ.). The first question raised by this appeal relates to remission of estate duty on the death of the testator, Dudley Jack Barnato Joel, who died on war service during the present war. Under the relevant legislation now in force, to which we will refer in more detail later in this judgment, remission of death duties is granted in the case of members of the armed forces who die on war service. This remission is granted in respect of property passing on the death to persons standing in certain specified relationships to the deceased (conveniently described as "specified relatives") and amounts to the whole of the duties leviable in respect of the first 5000*l.* of the property so passing and to such part of the duties on the remainder as exceeds what may for brevity be described as the value at the death of the duties which would have been payable if the deceased had lived to reach the normal expectation of life.

The manner in which the inland revenue authorities have calculated the remission to be allowed is set out in a document of quite exceptional obscurity. Fortunately, there is no need to examine or explain it. It is enough to state the principle on which the calculation is made. Broadly, it is that remission is to be granted in respect of so much of the total estate as is required to provide all the benefits given by the will to specified relatives, whether by way of specific or pecuniary bequest or by way of residuary gift, the remission being on the first 5000*l.* a total one and at the appropriate rate on the remainder.

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(1) [1917] 2 Ch. 278.
(2) 107 L. T. 146.
(3) 32 Ch. D. 408.

The question raised by the originating summons was whether the remission of estate duty thus allowed ought to be regarded as enuring for the benefit of all three residuary legatees or as enuring for the benefit of the two of them who are within the class of specified relatives, namely, the defendants, Stanhope Joel and Mrs. Rogerson, to the exclusion of Gerald Anthony Oldham. This question was framed on two assumptions, namely, that the remission allowed was correctly allowed, and that no one but a residuary legatee could claim to benefit by it. Farwell J. declined to deal with the question in so far as it related to estate duty remitted on the value of specific and pecuniary legacies to specified relatives other than the defendants, Stanhope Joel and Mrs. Rogerson. Subject to this, he declared that these two defendants ought to be credited in equal shares with the amount of the remission. He gave no reasons for his decision. By his notice of appeal Gerald Anthony Oldham asks for a declaration that the whole of the remission (including so much thereof as was not dealt with in the order of Farwell J.) enures for the benefit of all three residuary legatees in proportion to their shares in residue.

In the course of the argument a question arose as to the correctness of the basis on which the authorities had allowed the remission. It appeared to us that, if that basis were correct, the result would necessarily be that the statutory remission in the case of estate duty would in every case enure to the benefit of the residuary legatee or legatees whether or not they were within the class of specified relatives. Thus, to take a simple case, if a testator bequeathed 5000*l.* to his widow and his residuary estate to a stranger, the benefit of the remission would go to the stranger since there seemed to be no ground on which the widow could claim it. This appeared to us to be a remarkable result of legislation which on the face of it would appear to be aimed, and aimed only, at benefiting specified relatives. We considered that there were grounds for arguing that the remission ought only to be granted in respect of gifts to specified relatives which would otherwise be diminished by the exaction of estate duty. This view, if correct, would lead to the result that in the present case the only remission would be in respect of the gifts of two-fifths of the residue to each of the defendants Stanhope Joel and Mrs. Rogerson, and the substantial question raised by this part of the summons would not arise. These doubts having been raised, we did not think it convenient to deal with the matter in the absence of the Crown. Accordingly, we adjourned the hearing of the appeal that counsel for the Crown might be given the opportunity of appearing before us and explaining the reasons on which the remission had been passed. On the adjourned hearing, Mr. Stamp appeared for the Crown and gave us the benefit of a full explanation of the reasons for the official view for which we are much indebted to him. On consideration of the arguments and explanations placed before us on this aspect of the matter we intimated at an adjourned hearing that the remission allowed or proposed to be allowed was, in our opinion, in order, and, as the parties to the appeal desired to present additional arguments on that basis, we gave another hearing. At that hearing counsel appeared for an additional party, the testator's sister, Mrs. Doris Walter, whom we directed to be added as a defendant that we might have before us a specified relative who was a pecuniary legatee but took no share in residue.

It is now necessary to refer in rather more detail to the legislation under which estate duty is remitted in the case of members of the forces who die on war service. Apart from the case of common seamen, marines or soldiers, which was dealt with in s. 8 of the Finance Act, 1894, the remission was first introduced during the Boer War by s. 14 of the Finance Act, 1900. This section empowered the Treasury on the recommendation there stated to remit or repay up to the sum of 150*l.* "the whole or any part of the death duties . . . . leviable "in respect of property passing upon the death of the deceased "to his widow or lineal descendants if the total value for the "purpose of estate duty of the property so passing does not "exceed five thousand pounds." Shortly after the outbreak of the last war, the remission was extended by the Death Duties (Killed in War) Act, 1914, in two ways. First, the class of specified relatives was extended so as to include lineal ancestors; secondly, the amount of duty to be remitted or repaid was increased. [His Lordship read s. 1, sub-ss. 1, 2, 3, of the Act.] By s. 44 of the Finance Act, 1918, the scope of the remission was further extended by adding brothers and sisters and the descendants of brothers and sisters of the deceased to the list of specified relatives. Sect. 38 of the Finance Act, 1924, provided that the relief which might have been given under these earlier provisions "shall be given in "respect of the death duties payable on the death" of the persons specified in the section (sc. members of the armed forces) who die on active service or in certain other circumstances there stated.

In framing these provisions the legislature appears to have fallen into a trap in that it has endeavoured by one and the same set of words to deal with duties so radically different in character and incidence as legacy duty and succession duty, on the one hand, and estate duty, on the other. Estate duty on the free personal estate of a deceased person falls on residue, and if, pursuant to a statutory provision for remission of estate duty, the amount of duty is reduced, the person to benefit by the remission will prima facie be the person entitled to the residue. We say "prima facie" since such a statute might, of course, expressly or by implication direct that the benefit of the remission should go to the specified relatives, the gifts to whom were the occasion of the remissions. Moreover, a testator might himself give directions to that effect, but he has not done so in the present case. In the first instance, however, residue alone is affected. Accordingly, if the statute provides that a remission is to take place in respect of any benefit given by the will to a specified relative and the benefit takes the form of a pecuniary or specific legacy, prima facie the legatee is not benefited by the remission. As we have already pointed out, the apparent purpose of the legislation is to benefit specified relatives, and it does so operate in the case of legacy and succession duties, but in the case of estate duty, if the Crown's view be right, as, in our opinion, it is, the mere presence of a specified relative among the beneficiaries leads to a remission the benefit of which, unless the residuary legatee is a specified relative, will enure to a stranger. Moreover, if a legacy is given to one specified relative and the residue to another, the latter will enjoy the benefit of the remissions granted both in respect of the legacy and in respect of the residuary gift.

There appears to us to be no escape from these remarkable conclusions unless on the true construction of the legislation either (*a*) the remission is only to be granted in cases where a specified relative will, in fact, benefit by it, that is, cases where a specified relative is a residuary legatee, or (*b*) the benefit of the remission is to be adjusted in such a way as to confer it on the specified relatives the gifts to whom under the will have led to its being granted. We find ourselves driven to the conclusion that alternative (*a*) is inadmissible. Under s. 14, sub-s. 1, of the Act of 1900 the remission was not compulsory, but it might be granted as a matter of grace on the death duties "leviable in respect of property passing upon the "death of the deceased to his widow or lineal descendants." Now, in the case of a specific legacy to a widow there can be no question that estate duty is leviable in respect of the property comprised in the bequest. In such a case, therefore, remission could be granted. Prima facie, therefore, the residuary legatee will be the sole person to benefit. It seems to us impossible to say that no remission could lawfully be granted in such a case because the widow could not benefit by it. The Crown could, of course, have refused to grant the remission in such a case, but that it could lawfully have granted it is, we think, indisputable. The phrase "leviable "in respect of property passing to his widow" is not so apt to describe the case of a pecuniary legacy, but it is justly observed by Mr. Stamp that the phrase "property in respect "of which estate duty is leviable" is used elsewhere in the Finance Acts to cover the case of a pecuniary legacy (see s. 5, sub-s. 1, of the Finance Act, 1894, which imposed settlement estate duty and clearly includes the case of a legacy settled by will). We do not think it possible to construe the phrase in its present context as being applicable to specific, but not to pecuniary, legacies. The subsequent legislation is all built up on s. 14 of the Act of 1900, and under s. 38 of the Finance Act, 1924, remission which had previously been a matter of grace is, apparently, made compulsory. We can find nothing in this subsequent legislation which justifies us in saying that the basis laid down in the Act of 1900 has been altered. It is true that there are expressions in s. 1 of the Death Duties (Killed in War) Act, 1914, which seem to suggest that the legislature may have been under a misapprehension. Thus, in sub-s. 3, reference is made to "the relief in respect of "estate duty afforded to" specified relatives by the section. Again, sub-s. 2, if it is to be read as applying to estate duty, might be thought to be unnecessary or even meaningless if the benefit of the remission goes in any event to residue, but, if the legislature had intended to substitute a new basis of remission for that laid down by the Act of 1900, it would surely have said so in clear terms and would not have left its intention to be collected from such language as is used in these sub-sections.

We have explained as succinctly as we can our reasons for agreeing with the view put forward by Mr. Stamp. It only remains to consider the consequences. As we have said, the result of this view is prima facie to give the benefit of the remission to the residuary legatees (since, by virtue of the remission, the residue is larger than it would have been if the remission had not taken place) whether or not they be specified relatives. Is there anything in the legislation to take it away from them? In our opinion, there is not. Mr. Harman, on behalf of Mrs. Walter, argued that the benefit of the remission granted in respect of a legacy given to a specified relative goes to that specified relative so as to increase the value or amount of the legacy. It is with no disrespect to the argument that we say no more than that there appears to us to be no shred of justification for it. Mr. Romer, on behalf of Mr. Stanhope Joel and Mrs. Rogerson, agreed (and, in our opinion, rightly agreed) that, once the official view was held to be correct, he could not argue that the benefit of the remission in respect of the free personalty, whether given in the form of legacies or under the residuary gift, did not go to all three residuary legatees in the proportions in which they share in the residue. He argued, however, that in the case of the remission referable to the property appointed under the general power of appointment, the brother and sister between them were entitled to the whole benefit of it. He pointed out that, although the executors are bound to pay the duty on appointed property it is a charge on that property: *O'Grady* v. *Wilmot* (1). The result of this, he said, was that in the present case two-fifths of the charge ought to be attributed to each of the two shares of Mr. Stanhope Joel and Mrs. Rogerson and the remaining one-fifth to the share of Gerald Oldham so that the last-named would not be entitled to any remission. This argument is, in our opinion, based on a false hypothesis, since it treats the case as if there were three separate charges of duty, not one. The whole charge is on the whole of the appointed fund, and, if a remission is granted in respect of part of it, the net fund, after

(1) [1916] 2 A. C. 231.

providing for the reduced duty exigible, is so much larger than it would have been without the remission. It is this net fund which is distributable among the appointees in the proportions stated in the will, and we find nothing to justify us in saying that a subsequent adjustment ought to be made so as to give to the brother and the sister more, and to Gerald Oldham less, than their stated shares of the net fund.

This is, in our opinion, sufficient to dispose of the argument. Mr. Roxburgh, however, took a further point on behalf of Gerald Oldham. He said that the direction in cl. 9 of the will is to divide the residue including the appointed fund after payment of "my death duties." This phrase, he said, covers the duties on the appointed fund as well as those on the testator's own property and amounts to a direction to pay all duties exigible (which on the facts means the actual amount payable after taking account of all remissions granted) out of the whole of the property disposed of before any distribution is made. The three residuary legatees, therefore, share in the net funds in the proportions stated, and thus all three enjoy their proportionate share of the benefit of the remission. This argument is, in our opinion, correct and affords an additional answer to Mr. Romer's claim. No special point arises in respect of the remission referable to the real estate. The appeal on this question will be allowed, and for that part of the order of Farwell J. which deals with this part of the case there must be substituted a declaration in the form asked for by the notice of appeal.

The second question raised by the notice of appeal relates to the bequest to Mrs. Rogerson of the testator's leasehold house, No. 74 Brook Street, together with the contents, contained in cl. 5 of the testator's will. Farwell J. held that this constituted two separate and independent gifts, namely, (*a*) a gift of the house, and (*b*) a gift of its contents, and that, consequently, Mrs. Rogerson was entitled to disclaim either of the gifts without disclaiming the other. Gerald Oldham challenges the correctness of this decision. The answer to the question depends on the ascertainment of the true construction of cl. 5 of the testator's will. Clause 5 is in the following terms: "I devise free of duty my house at 74, Brook "Street together with the contents except such as I have herein "specifically bequeathed some of which in the event of my "death during the present war will be at Moulton Paddocks "except money and securities from money to my sister Eileen

"Rogerson." There is nothing further in the will to be considered in connexion with this question. Apart from authority the bequest appears to constitute one gift, for the bequest is of the house together with its contents. The ordinary meaning of the words "together with" as stated in the Imperial Dictionary is "in union with," "in company "with." Apart from any other context when a testator makes a gift of a house and the furniture in it he would seem to be giving the furniture because it is situated in the house and goes to make up one whole which the testator knows as his furnished house. Farwell J. would, we gather from his judgment, have so decided the case had he not felt constrained by authority to come to a contrary conclusion. The authority by which he felt bound is the decision of Joyce J. in *In re Lysons* (1). In that case the testator bequeathed to her step-son "my leasehold messuage with the appurtenances "belonging thereto situate and being No. 11, Wilton Street, "wherein I now reside . . . . together with all articles of personal "or domestic or household or stable or garden use or ornament "and all the horses carriages harness and saddlery belonging "to me and not hereby otherwise disposed of." Joyce J. said that he thought there was one gift, and that it was in the natural fitness of things that the house and furniture and contents should be given together to the same person. He referred to *Syer* v. *Gladstone* (2) as having been cited to him as an authority for the proposition that where a testator gives to any person a leasehold house and the furniture it contains the legatee is entitled to take the furniture and disclaim the gift of the house, and he proceeded to say: "There are "very few cases that have been so much observed upon as "*Syer* v. *Gladstone* (2). Whatever else, however, it may be an "authority for, it cannot, I think, be any authority for that "proposition that I have mentioned." We respectfully agree with this statement. Joyce J. continued by commenting on Sir George Farwell's interpretation of the decision in *Syer* v. *Gladstone* (2) and concluded by saying: "But undoubtedly "speaking of *Syer* v. *Gladstone* (2), Cotton L.J. in *In re* "*Hotchkys* (3) says: 'in that case there was a gift of property "' and of certain things on the property. That was a case "' where there were two bequests, one of land or houses and "' the other of chattels. In my opinion those were two

(1) 107 L. T. 146.
(2) 30 Ch. D. 614.
(3) 32 Ch. D. 408, 418.

"'separate gifts of which the legatee might accept the one "'and might reject the other.'" In the same case Lindley L.J. says (1): "I agree with Cotton L.J., *Guthrie* v. *Walrond* (2) "is more applicable to this particular devise than the case of "*Syer* v. *Gladstone* (3), which is to be explained by the fact "that according to the proper construction of the will in that "case there were two gifts." It was in deference to those opinions that Joyce J. held that there were two separate and independent gifts in *In re Lysons* (4) although it is plain that, had it not been for these opinions, he would have come to the conclusion there was but one gift. In the judgment of Pearson J. in *Syer* v. *Gladstone* (3) there is no mention of the furniture and contents of the freehold house. What he seems to be dealing with is a devise of real property subject to a mortgage coupled with other property and a gift in the same clause of several leaseholds some of which are onerous and some profitable, for he starts his judgment with a statement to this effect. The statements of Cotton and Lindley L.JJ. in *In re Hotchkys* (5) quoted by Joyce J. seem to us to be inaccurate, but in any view, they are not binding on this court. In our judgment, there is nothing in *Syer* v. *Gladstone* (3) or *In re Lysons* (4) which compels this court to construe the bequest in the present case, contrary to what seems to us to be the prima facie and ordinary meaning of the words used by the testator, as constituting two independent gifts and not one joint gift. We, therefore, think that the judgment of Farwell J. on this point should be discharged and a declaration in accordance with the latter part of the notice of appeal substituted for it.

Appeal allowed.

Solicitors: *Slaughter & May; Solicitor of Inland Revenue; Gery & Brooks; Allen & Overy.*

(1) 32 Ch. D. 408, 419.
(2) (1882) 22 Ch. D. 573.
(3) 30 Ch. D. 614.
(4) 107 L. T. 146.
(5) 32 Ch. D. 408, 418.

H. C. G.

Applied. *Re* MUNICIPAL AND GENERAL SECURITIES CO., LTD.'S TRUST. [1949] 2 All E.R. 937.

MORTON J.

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July 12.

In re PRATT'S WILL TRUSTS.

BARROW *v.* McCARTHY AND OTHERS.

Trust—Sale—Power—Investment—Bequest to trustees on trust to pay income to life-tenant—Remainder to other persons as to capital and income—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 1, *sub-s.* 1; *s.* 57, *sub-s.* 1.

A testatrix bequeathed to her executors and trustees certain shares and the dividends and income accruing therefrom at her death on trust to pay the dividends or income thereof to her nephew for life and then, as to both income and capital, on trust for other persons. The will contained no express trust for sale:—

Held, that the shares were "trust funds . . . . in a state of "investment" in the hands of the trustees, within the meaning of s. 1, sub-s. 1, of the Trustee Act, 1925, and that the wording of that sub-section was wide enough to give to the trustees a power to sell the shares.

Hume v. *Lopes* [1892] A. C. 112, applied.

ADJOURNED SUMMONS.

By her will dated November 23, 1936, a testatrix appointed executors and trustees, and by cl. 2 (*c*) bequeathed to them "all my shares in the —— Estates, Ld., together with all "dividends and income accruing thereon at my death upon "trust to pay the dividends or income thereof to my said "nephew" [one of the trustees] "during his life and after "his death (as to both income and capital) in trust for all "or any his child or children who being male attain the age "of twenty-one years or being female attain that age or "marry and if more than one in equal shares and if there "shall be no such child in trust for my said nieces" [naming two persons] "absolutely as tenants in common in "equal shares." By cl. 6 the testatrix devised all the residue of her property to the same nephew and nieces as tenants in common in equal shares. There was no express trust for sale. The testatrix died on April 17, 1939. The nephew was married, but, at the date of this summons, he had had no children. On May 26, 1943, he took out this summons under s. 57, sub-s. 1, of the Trustee Act, 1925 (1), asking (inter alia)

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(1) By s. 1, sub-s. 1: "A "trustee may invest any trust "funds in his hands, whether at "the time in a state of investment "or not, in manner following . . . . "and may also from time to time "vary any such investment."

By s. 57, sub-s. 1; "Where

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that he and the second trustee of the will, who was the first defendant to the summons, might be empowered or authorized, under that section or otherwise, to sell at such price as they should think proper all or such part as they might think proper of the shares specifically bequeathed to the trustees on trust for the benefit of the nephew, his children (if any), and the nieces. The nieces were the remaining two defendants to the summons. When the summons came before the judge in chambers, it was suggested on behalf of the other trustee of the will that s. 57 did not apply, and the summons was adjourned into court for argument.

Wilfrid Hunt for the second trustee. It is not s. 57, sub-s. 1, of the Trustee Act, 1925, that applies here, but s. 1, sub-s. 1. Sect. 57 can apply only where the trustees have no power of sale. In the present case they have that power by reason of the provisions of s. 1, sub-s. 1: see Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. ii., p. 1262; p. 1263, n.; p. 1268, n. On the true construction of s. 1, sub-s. 1, the shares in the present case are "trust funds in the hands of the trustees," and they are at present in a state of investment. The trustees "may invest" that "fund," and, as it is "at the time in a state of investment," that power to invest must entail a power of sale. Sect. 3 of the Trust Investment Act, 1889 (the provision corresponding to s. 1, sub-s. 1, of the Trustee Act, 1925), did not contain the words "whether at the time in a state of investment or not," but in *Hume* v. *Lopes* (1) the House of Lords decided that the words "trust funds in his hands" were not confined to moneys awaiting investment, but included all trust funds in the hands of the trustee, whether in a state of investment or not, thereby confirming the decision of the Court of Appeal in the same

"in the management or administration of any property vested in trustees, any sale . . . . is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended and the costs of any transaction, are to be paid or borne as between capital and income."

(1) [1892] A. C. 112.

case under the name *In re Dick* (1). The trustees' power to invest under s. 1, sub-s. 1, of the Act of 1925 could be displaced only if a contrary intention were expressed in the will: s. 69, sub-s. 2: see also *In re Warren* (2), and there is no such direction. Thus, it is not necessary for the court to make the order asked for.

H. A. Rose for the plaintiff. Sect. 57, sub-s. 1, not s. 1, sub-s. 1, applies. Sect. 1, sub-s. 1, applies only where the trustees have active duties to perform. Here they have no active duties with regard to the trust fund, but are simply bare trustees. They are not under any duty to invest. In cases such as the present, where specific stock is settled on trust for A. for life, with remainder to B. and C., trustees could not sell until statutory authority gave them a wider range of trustee investments: *In re Box* (3); *In re Warde* (4). [He referred also to *In re Rogers* (5).]

Hunt. *Waite* v. *Littlewood* (6) is rather the other way: see Lewin on Trusts, 14th ed., p. 360.]

J. F. Bowyer for the nieces.

MORTON J. I have to determine whether trustees have power to sell an investment which is specifically bequeathed to them on trust to pay the dividends or income thereof to A. for life and after the death of A. on trust as to capital and income for B. and C. Sect. 1, sub-s. 1, of the Trustee Act, 1925, provides that "a trustee may invest any trust funds in "his hands whether at the time in a state of investment or "not, in manner following . . . ." There follows a list of investments and the sub-section concludes with the words, "and may also from time to time vary any such investment." The definition section (s. 68) does not define the meaning of "trust funds," and Mr. Hunt was unable to find any other section in which the words were used except s. 15 (*b*). By s. 69, sub-s. 1: "This Act, except where otherwise expressly provided, "applies to trusts, including, so far as this Act applies thereto, "executorships and administratorships constituted or created "either before or after the commencement of this Act." By sub-s. 2: "The powers conferred by this Act on trustees "are in addition to the powers conferred by the instrument, "if any, creating the trust but those powers, unless otherwise

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(1) [1891] 1 Ch. 423.
(2) [1939] Ch. 684.
(3) (1863) 1 H. & M. 552.
(4) (1861) 2 J. & H. 191.
(5) [1915] 2 Ch. 437.
(6) (1872) 41 L. J. (Ch.) 636.

"stated, apply if and so far only as a contrary intention is not "expressed in the instrument, if any, creating the trust, and "have effect subject to the terms of that instrument."

Looking at the matter apart from authority, I should have said that the shares in question were trust funds in the hands of the trustees, such trust funds being in a state of investment, and that, there being no contrary intention "expressed in the "instrument, if any, creating the trust," the trustees have power to invest these funds in the manner described in s. 1, sub-s. 1. That being so, it seems there must necessarily be implied a power in the trustees to sell, because, clearly, funds which are in a state of investment cannot be invested in another security unless they are first sold.

The matter, however, is not free from authority. I have been referred to *Hume* v. *Lopes* (1) where a large amount of government stock had been bought by trustees after the testator's death. The respondent, Hume-Dick, who was tenant for life in possession, had requested the trustees to sell enough government stock to raise 106,900*l.* and to invest that sum on mortgage of freehold estates in England. The trustees took out an originating summons for the opinion of the court whether they had power to do this, and the Court of Appeal (2) held that they had the power. At that time the relevant statute was the Trust Investment Act, 1889, s. 3 of which provided: "It shall be lawful for a trustee, unless "expressly forbidden by the instrument (if any) creating the "trust to invest any trust funds in his hands in manner "following . . . ." There followed a list of permitted investments, and the section concluded: "and also from time to "time to vary any such investment." The House of Lords upheld the decision of the Court of Appeal. Lord Watson said (1): "My Lords, I entirely agree in the result at which "the Court of Appeal has arrived, but I am disposed to reach "that result by a shorter road. In my opinion, the expression "' trust funds ' occurring in the commencement of s. 3 of the "Act of 1889 signifies funds belonging to the trust, including "money invested on security or otherwise, as well as uninvested cash. I do not doubt that such is the ordinary and "natural meaning of the words. Unless, therefore, some rule "can be found which excludes that meaning in this particular "context, that meaning must be attached to them. Now, "within the four corners of the Act itself, I can find nothing

(1) [1892] A. C. 112, 115. (2) Sub nom. *In re Dick* [1891] 1 Ch. 423.

"to suggest that the meaning of the words should be limited "to actual cash waiting for investment. On the other hand, "I find a good deal in the statute itself which suggests that no "such limitation ought to be imposed. But then it is said "that these words had previously acquired a technical meaning "which the legislature must be assumed to have had in view, "and to have intended to attach to their use in s. 3. It cannot "be said that the words, according to their ordinary acceptation in a court of equity, have any such limited technical "meaning as cash waiting for investment. What has been "suggested is, that there are similar words occurring in older "statutes having the same subject-matter as the present Act, "namely, the investment of trust funds, and that the words "were there used in the limited sense contended for by the "appellant. If there had been a series of statutes using the "same expression, and it had been authoritatively construed "by a series of decisions, that would have raised a case for your "Lordships' consideration very different from that which is now "presented to us; because, upon an examination of the "authorities, the argument comes to this, that in the Vice-"Chancellor's court, upon statutes containing similar expressions, those expressions were construed in two different ways "by two different judges—one giving the words their primary "and natural meaning, the other giving the words the restricted "meaning which I have explained. I do not think that in that "state of the authorities it can be reasonably suggested that "the legislature had in view any meaning of the words other "than their natural and popular meaning. If that be so, cadit "quaestio. It is admitted that so reading the statute the "judgment of the court below is right." Lord Macnaghten said (1): "My Lords, I am of the same opinion. I do not "myself feel the difficulty which seems to have pressed upon "the Court of Appeal with regard to the earlier words of s. 3 "of the Act of 1889. That section authorizes a trustee, unless "expressly 'forbidden by the instrument (if any) creating the "'trust, to invest any trust funds in his hands' in the manner "there specified. I do not see why those words should be "limited to cash waiting investment. They appear to me to "be the widest words possible, and to include all funds belonging to the trust and under the control or dominion of the "trustee. I read the words in the section as authorizing a "trustee to invest any trust funds in his hands, whether at the

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(1) [1892] A. C. 116, 117.

"time in a state of investment or not, in the securities men-"tioned in the Act." Lord Morris concurred entirely in the judgments which were delivered by Lord Watson and Lord Macnaghten. I think that the observations which I have just quoted tend to support the view which I have already expressed as to the meaning of the Act of 1925. It was, no doubt, as a result of that case that the words "whether at "the time in a state of investment or not" were inserted in s. 1 of the Trustee Act, 1893. I was referred, on the question what is a "contrary intention," to *In re Warren* (1), but, as it is not contended that in the present case there is any contrary intention expressed in the instrument, I need not refer in detail to that case.

Mr. Rose submitted that s. 1, sub-s. 1, of the Act of 1925 applies only where the trustees have a duty to invest, and he drew my attention to certain earlier cases including *In re Warde* (2), *In re Box* (3), and *Waite* v. *Littlewood* (4). The effect of *In re Warde* (2) is stated thus in Lewin on Trusts, 14th ed., p. 360: "By the Law of Property Amendment "Act, 1859 (commonly known as Lord St. Leonards' Act), ". . . . s. 32, trustees, executors and administrators, where "not expressly forbidden by the instrument creating the "trust, were authorized to invest trust funds in the stock "of the Bank of England or Ireland or on East India "Stock; but the Act was held not to apply where a "particular fund was settled specifically and there was no "power of varying securities." In a footnote the learned author refers to *In re Warde* (2) and says: "but see contra "*Waite* v. *Littlewood* (4) . . . . in which case, however, the "case before Wood V.-C. was not cited. By the Amendment "Act (23 & 24 Vict. c. 38, s. 12) s. 32 of Lord St. Leonards' "Act was made retrospective." It would appear that *In re Warde* (2) and *Waite* v. *Littlewood* (4) were the conflicting authorities which were referred to by Lord Watson in *Hume* v. *Lopes* (5). Mr. Rose further pointed out that, before the legislature intervened to increase the range of investments open to trustees, where specific stock was settled on trust for A. for life with remainder to B. and C. there was no power in the trustees to sell that investment, and he suggested that the Act of 1925 is directed only to a case in which the trustees

(1) [1939] 1 Ch. 684.
(2) 2 J. & H. 191.
(3) 1 H. & M. 552.
(4) 41 L. J. (Ch.) 636.
(5) [1892] A. C. 112, 116.

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PRATT'S WILL TRUSTS, *In re.*

BARROW *v.* McCARTHY.

are in a position to consider what investments they should select, in other words, a case in which there is a trust for sale or an express power of sale. In my view, however, having regard to the language of s. 1, sub-s. 1, of the Act of 1925 and to the observations of the House of Lords in *Hume* v. *Lopes* (1), I cannot give such a narrow meaning to s. 1, sub-s. 1. It is conceivable that the legislature only intended to deal with such a case as that described by Mr. Rose, but, whether that be so or not, the language used is wide enough to confer on trustees a power of sale in such a case as the present. This is the manner in which I was disposed to read the Act apart from any authority, and I find no authority which in any way leads me to the conclusion that I ought to give the Act a narrower interpretation. The result is that in the present case the trustees have a power of sale. I cannot, therefore, make the order which is asked under s. 57 of the Trustee Act, 1925, because the words "by reason of the absence of any power "for that purpose vested in the trustees by the trust instru-"ment, if any, or by law" are not applicable to the case. The trustees, however, will be able to sell the shares without any order. The costs of all parties will be taxed as between solicitor and client, and paid out of the trust fund.

Solicitors for the nephew and the other trustee: *Ralph Bond & Rutherford.*

Solicitors for the nieces: *Preston & Hudson.*

(1) [1892] A. C. 112.

K. R. A. H.

COHEN J.

1943

July 21, 29.

In re CORELLI.

WATT *v.* BRIDGES.

Charity—Charitable bequest—Validity—Maintenance of property for benefit of distinguished visitors to neighbourhood.

A testatrix, by her will, placed the residue of her estate and effects, including her estate at M. C., in the care of her trustees, to enclose all the freehold land at M. C. as a breathing space and air zone for the health of the town of S., her expressed intention being that the ultimate trusts of the house and grounds at M. C. be continued in perpetuity for the benefit and service of distinguished visitors from far countries visiting S. who would otherwise seek their quarters in a hotel. She also directed that the income of the estate and other property should be held for the upkeep of M. C. to be used for the promotion of science, literature and music among the people of S.:—

Held, that, although the directions for the establishment of an air zone and for the promotion of science, literature and music might have constituted a valid charitable bequest, the dominant motive of the testatrix was to be found in the trust for the establishment at M. C. of a hotel for the entertainment of distinguished visitors from far countries, and that that trust was void for remoteness.

ADJOURNED SUMMONS.

By her will, dated June 5, 1922, Marie Corelli, after giving a life interest in her estate to her friend, Bertha Vyver, placed the residue of her estate and effects, including her estate at Mason Croft, in the care of her trustees "upon trust that nothing "whatsoever be sold or disposed of out of Mason Croft and that "all books, pictures, furniture, curios and household goods "shall be kept intact and carefully preserved as they now are. "And upon trust after the decease of the said Bertha Vyver "my trustees shall secure the sanction of the Board of Trade "or other appropriate authority to the formation of a company "(excluding objects of profit or gain) to be incorporated upon "the lines of those of the 'Leighton House Association' London "or alternatively to create by deed a trust in either case to "provide for the ultimate preservation and use of my estate "inclusive of Mason Croft . . . . so that no portion of this free-"hold land shall be sold or built upon but be preserved intact "and in good condition with all timber thereon . . . . and that "all this freehold land shall be enclosed as a breathing space "and air zone for the health of the town of Stratford-upon-"Avon . . . . my intention being that the ultimate trusts of "Mason Croft shall after the decease of all the beneficiaries "specifically named by me be continued in perpetuity for the "benefit and service of distinguished persons visiting Stratford-"upon-Avon from far countries who shall be selected and "recommended to my trustees by the Council of the Society of "Authors and also as a meeting place as and when required "by the President of the Royal Institution of Great Britain "for the annual or provincial gatherings of scientists connected "with that institution so that the house and grounds apper-"taining thereto as hereinbefore described shall be at the "service of any such selected or distinguished persons whom "my trustees shall approve visiting the town of Stratford-"upon-Avon and who would otherwise seek their quarters in a "hotel. But in particular I declare that my trustees shall "hold the income of my estate and the moneys obtained "from my copyrights and the investments made in my property "absolutely in trust for the relief and preservation of Mason "Croft to be used on the lines and with the intention as manifested in 'Leighton House Association' of London for the "promotion of science literature and music among the people of "Stratford-upon-Avon . . . ." The testatrix died on April 21, 1924, and Bertha Vyver died on November 20, 1941, having continued to live at and keep up Mason Croft until the date of her death. After her death, doubts having arisen whether the trusts in respect of the upkeep and maintenance of Mason Croft were charitable, a summons was taken out by the trustee of the will to determine the validity of the dispositions of Mason Croft under the will.

W. F. Waite for the trustee.
Pennycuick for two beneficiaries.
Danckwerts for the Attorney-General.
Fawell for the Solicitor-General.

Cur. adv. vult.

July 29. COHEN J. read a judgment in which, after reading the material provisions in the will and saying that certain directions were mere machinery and threw no light on the question which he had to decide, he said: There appear to be three portions of the devise and bequest which have a bearing on the matter, (*a*) the direction to enclose all the freehold land as a breathing space and air zone for the health of the town of Stratford-upon-Avon, (*b*) the expressed intention that the ultimate trusts of the premises shall, after the decease of all the specifically named beneficiaries, be continued in perpetuity for the benefit and service of distinguished visitors from overseas to be selected or recommended by the Council of the Society of Authors and also as a meeting place as and when required by the President of the Royal Institution of Great Britain for the annual or provincial gatherings of scientists connected with that institution so that the premises should be at the service of any such selected or distinguished person or persons whom her trustees should approve and who would otherwise seek quarters in a hotel, and (*c*) the declaration as to the income of the estate, and that it should be held for the upkeep of Mason Croft "to be used on the lines and with "the intention as manifested in the 'Leighton House Asso-"'ciation'" of London for the promotion of science, literature "and music among the people of Stratford-upon-Avon."

COHEN J.

1943

CORELLI, *In re.* WATT *v.* BRIDGES.

My attention was directed to a number of cases bearing on the point which I have to decide. These and other cases at which I have looked appear to settle the following points: (*a*) The fine arts are not in themselves regarded as objects of charity although they would be if the element of instruction is introduced. That appears from *In re Ogden* (1). (*b*) A trust for the benefit of the inhabitants of a particular place is charitable: *Goodman* v. *Saltash Corporation* (2), but this principle will not apply if the objects by which the inhabitants are to be benefited are too uncertain: *Houston* v. *Burns* (3). If, however, they are sufficiently certain, the trust will be a valid charitable trust, notwithstanding that, but for the association with the inhabitants of a particular place, the purposes might not have been charitable: see *In re Spence* (4), where Luxmoore J., commenting on *Houston* v. *Burns* (3), said: "In that case the gift in question was to a number of individuals "as trustees and was to be applied by them 'for such public, "'benevolent or charitable purposes in connexion with the "'parish of Lesmahagow or the neighbourhood in such sums "'and under such conditions as they in their discretion shall "'think proper.' The House of Lords held that the gift was "void for uncertainty notwithstanding the express limitation "to the particular locality named. The ground of the decision "was that if the clause was to be construed (as in fact it was "construed by the House of Lords) as being for such public, "or benevolent or charitable purposes connected with the "locality as the trustees thought proper, it was bad because "the purpose was too vague and the vagueness of the purpose "was not cured by the specification of the locality to be "benefited: see the judgment of Lord Finlay L.C.; but the "learned Lord Chancellor pointed out in his speech that in "the case of a gift of this nature the addition of a local limit "might well make a difference in favour of its validity if the "gift 'was in favour of institutions within a certain area, "'the particular institution to be selected by the trustee.' "Lord Atkinson said in the course of his judgment: 'It is "'the insufficiency of these words "public purposes," because "'of their vagueness and uncertainty, to identify and fix

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(1) (1909) 25 T. L. R. 382.

(2) (1882) 7 A. C. 633.

(3) [1918] A. C. 337.

(4) [1938] Ch. 96, 103.

"'the limits of the class of individuals or objects from which "'the trustees are to choose that renders void a bequest for "'"public purposes." That is their weakness, and that weakness "'is not cured by coupling them with a definition or description "'of the physical area within which the public purposes are "'to be comprised.' But he went on to point out that the "case under consideration had no resemblance 'to those in "'which property is vested in trustees to be applied for the "'support or benefit of such institutions of a particular class "'as may be in existence, or in the course of creation, in any "'given town or area at the time at which the will speaks. "'There is no vagueness or uncertainty in such cases at all.' "And Lord Shaw said: 'Local limitations expressed by the "'words "in connexion with the parish of Lesmahagow or the "'" neighbourhood" do not add any definiteness to the class "'of purposes or objects which it was in the mind of the "'testator to benefit or promote. The foundation of political "'clubs, schools of art, a zoological garden, or an astronomical "'observatory in Lesmahagow, along with a thousand other "'things in connexion with that parish or its neighbourhood, "'might, in the trustees' opinion, be excellent, but the bequest "'is void by reason of the uncertainty as to which of them "'or which class of them the truster meant to favour. This "'is exactly the reason which invalidates the bequest where "'there is no geographical reference. Local limitations do "'come into play and make the bequest effective if and when "'they provide the means of identifying the particular objects "'or institutions which the testator has meant to benefit.'" (*c*) A trust for the benefit of a particular profession is not a valid charitable gift, even though the benefit conferred on the profession may also enure to the benefit of the country as a whole. *General Medical Council* v. *Inland Revenue Commissioners* (1).

Applying these principles to the bequest which I have to consider, it seems to me that, if I come to the conclusion that the dominant motive of the testatrix is to be found in the first and third of the three portions of the bequest to which I have referred, or in either of them, the bequest will be a valid charitable bequest. Whether or not the establishment of breathing spaces and air zones or the promotion of science, literature and music are, apart from the association of these purposes with a particular locality, valid charitable objects

(1) [1928] W. N. 98.

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1943

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I need not decide, for I feel no doubt but that, on the authority of the cases to which I have referred, I should be bound to hold that a bequest for the carrying out of those purposes in Stratford-on-Avon would be a valid charitable bequest. The second portion, however, presents much greater difficulty. I do not think that the establishment in perpetuity of a hotel for the entertainment of distinguished foreigners would be a valid charitable bequest, and the fact that the premises were also to be available for the annual and provincial meetings of scientists connected with the Royal Institution would not suffice to save the bequest. If, therefore, I come to the conclusion that this portion expresses the dominant motive of the testatrix, I am bound to hold that the gift fails. Now, this portion of the gift starts with the words, "my intention "being," and, having stated her intention, she goes on to express her objective as being "so that" the house and grounds should be at the service of selected and distinguished persons. Prima facie, therefore, the testatrix has herself indicated her dominant motive, and I do not think I can properly regard this intention as being subservient to a more general intention to benefit the inhabitants of Stratford-on-Avon. The directions as to the open space and air zone are only casually introduced in connexion with the directions as to the machinery to be employed in giving effect to the testatrix's bequest. The direction as to the promotion of science, literature and music appear to be ancillary to her direction that the income of her estate and copyrights shall be used for the upkeep and preservation of "Mason Croft," her intention as to which she had already expressed in what I have called the second portion of the bequest.

In these circumstances, although the question is not without difficulty, I think I am bound to come to the conclusion that the dominant motive of the testatrix is to be found in the second portion of the bequest which begins with the words, "my intention being." It, therefore, follows that, in my judgment, the trusts contained in the will of the testatrix with regard to "Mason Croft" and its contents and any property the income of which was directed thereby to be held in trust for the upkeep and preservation of "Mason Croft" are void for remoteness.

Solicitors: *Maffey & Brentnall; Field, Roscoe & Co.; Treasury Solicitor.*

J. L. D.

BENNETT
J.

1943
July 29, 30.

In re POLLOCK.

PUGSLEY v. POLLOCK.

Administration—Interest on legacy—Date from which payable—Legacy payable " immediately after my death "—Legacy to trustees of infant son on attaining twenty-five.

A testator bequeathed several pecuniary legacies, including 1000*l.* to his wife " to be paid to her immediately after my death "for her immediate requirements " and 10,000*l.* "to my trustees ". . . . upon trust for my said son . . . . if he shall attain the "age of twenty-five years absolutely but if he shall die under "that age then I direct that the same shall fall into and form "part of my residuary estate " :—

Held, (1.) that the widow was entitled to immediate payment of the legacy of 1000*l.*, and was, therefore, entitled to interest as from the date of the testator's death.

In re Riddell [1936] W. N. 252, followed.

(2.) That the legacy of 10,000*l.* was given to the trustees of the will, and, therefore, carried interest at the expiration of one year from the date of the testator's death.

ADJOURNED SUMMONS.

By his will, dated July 2, 1937, a testator, who died on April 25, 1941, appointed his wife and two other persons executors and trustees thereof, and bequeathed to his wife a legacy of 1000*l.* "to be paid to her immediately after my "death for her immediate requirements." A summons was taken out by the two other trustees to determine whether the legacy carried interest from the testator's death or only from the expiration of a year after his death.

Wilfrid M. Hunt for the trustees.

Wynn-Parry K.C. and *W. F. Waite* for the widow. *In re Riddell* (1) is a direct authority for the proposition that the presence of the word "immediately" in such a gift as this specifies a date, at which the donee is entitled to be paid, namely, the date of the testator's death. Interest on this legacy, therefore, runs from that date.

Vaisey K.C. and *D. H. Cohen* for the testator's son, an infant interested in another legacy and in the residuary estate. The interest on this legacy does not begin to run until a year after the testator's death. The word "immediately" confers on the gift to the widow no priority over the other legacies

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(1) [1936] W. N. 252.

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POLLOCK, *In re.*
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and does not constitute a direction that interest on this legacy shall run from the death of the testator. As to the legal meaning of "immediately," see Stroud's Judicial Dictionary.

F. C. Watmough for two other legatees.

1943. BENNETT J. This point is precisely covered by *In re Riddell* (1), where the legacy was in these terms: "I bequeath to —— free of death duties the sum of 100,000*l*. "I direct that such legacy shall be paid immediately after my "death, and that the same shall be paid in priority to all other "legacies and annuities bequeathed by my will and treated "as a first charge on my estate." On the question being raised whether that legacy carried interest from the death of the testator or from a year after the death, Farwell J. said: "Generally speaking a legacy carries interest from one year "after the death, but there are exceptions, as in the case where "the testator was the father of, or stood in loco parentis to, "the legatee. In this case there is an express direction that "the legacy shall be paid immediately after the death. It is "plain, in my judgment, that these words do entitle the widow "to immediate payment and, that being so, she is entitled "to interest as from the date of the death." I shall follow that decision and decide that this legacy carries interest from the testator's death.

A further question was raised by the summons. The testator having bequeathed "to my trustees the sum of "10,000*l*. upon trust for my said son . . . . if he shall attain "the age of twenty-five years absolutely but if he shall die "under that age then I direct that the same shall fall into "and form part of my residuary estate," the court was asked to determine whether the legacy carried interest until paid or set aside as from the death of the testator, or from one year after his death, or only as from the date when the testator's son attained the age of twenty-five.

Vaisey K.C. The rule that interest is payable as from the testator's death because the testator is in loco parentis applies. It makes no difference to the application of the rule that the legacy is not given directly to the infant, but to a trustee on his behalf. [He referred to Theobald on Wills,

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(1) [1936] W. N. 252.

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9th ed., p. 155; *In re Jones* (1); and *In re Medlock* (2).]

Watmough. Interest on this legacy is not payable until a year after the testator's death. This is a gift to trustees and it is not possible to apply to it a rule which exists only where the gift is made directly to the infant. [He referred to *In re Abrahams* (3).]

BENNETT J. The rules with regard to the payment of interest on pecuniary legacies are technical. In the ordinary case of a pecuniary legacy without any direction as to payment of interest on it, the legacy, being vested, carries interest at the expiration of one year from the death of the testator. A contingent pecuniary legacy carries no interest until the contingency happens, but to that rule there is the exception that a contingent pecuniary legacy either to a child of the testator or to a person to whom the testator stands in loco parentis, carries with it interest from the date of the death of the testator if there is no other provision in the will for maintenance. The terms of the present legacy are such as not to bring it within that class of legacy. The testator recognized, apparently, as did the testator in *In re Medlock* (2) that the persons appointed to be executors and trustees might have to act in two distinct capacities—in one capacity as executors and in another as trustees—and the legacy with which I am concerned is given to the trustees of the will in that capacity. In those circumstances the case does not fall within one of the exceptions to the general rule and, therefore, the legacy cannot carry interest from the death of the testator.

Is there any other technical rule or principle on which the legacy can carry interest from the testator's death? I know of none, and no case has been cited to me which supports the argument that a legacy in the form in which this legacy has been given carries such interest. In form, the legacy is given in terms which are substantially the same as that which the court had to consider in *In re Medlock* (2). It is a legacy to trustees and, unless there is some provision in the testator's will which indicates that the ordinary rule is to be departed from, such a legacy carries interest at the expiration of one year from the testator's death. That interest is regarded as part of the income produced by the legacy. Any such interest and any income produced by the investment representing the legacy follow the principal, and if the event happens, the income or the interest, as the case may be, goes to the person to whom, in that event, the capital of the legacy goes. Meantime, the interest may be used for the maintenance of the legatee, if in the interval he requires to be maintained. The answer to this question, therefore, will be that the legacy carries interest from one year after the death of the testator.

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(1) [1932] 1 Ch. 642.

(2) (1886) 54 L. T. 828.

(3) [1911] 1 Ch. 108.

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1943
POLLOCK, *In re.*
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Solicitors: *Lake & Son, for Hole & Pugsley, Tiverton.*

J. L. D.

In re JOHNSON'S SETTLEMENT TRUSTS.

McCLURE *v.* JOHNSON.

COHEN J.
1943
July 6, 7.

Power of appointment — Rule against perpetuities — Remoteness — Direction to raise capital to supply deficiency in income—Interest in capital contingent on events—Gift over—Validity.

In exercise of a special power of appointment among children and issue contained in a marriage settlement the wife, after her husband's death, appointed the settled property equally among all her children, one son and four daughters, the shares of three of the daughters being settled on them for life and after their deaths to their children, if any, with an accruer clause on failure of issue of any daughter to the others and their issue. The deed of appointment directed the trustees, if the income of any settled share, after deduction of tax, should fall below 400*l.* a year, to raise the deficiency out of the capital of the share, and pay or apply it for the maintenance of the daughter. Owing to the increase in the rate of income tax, the income of each settled share fell below 200*l.* :—

Held, that the direction purported to give a vested interest in the capital on a contingency which might never occur, or might be too remote, and was, therefore, void as infringing the rule against perpetuities.

In re Cassel [1926] Ch. 358 distinguished.

Held, further, that the gift over on failure of issue of daughters was also void under the rule, and in such an event the daughter's share would vest absolutely in her as part of her estate.

Rucker v. *Scholefield* (1862) 1 H. & M. 36 applied.

ADJOURNED SUMMONS.

By a settlement made on September 22, 1882, on the marriage of Josephine Emily Dobree to the Rev. Alfred Cecil Johnson, Mrs. Johnson was given power in the events which happened to appoint the trust fund among her children or other issue as therein mentioned, and, in default of such appointment, the trust fund was to be held on trust for all and every her children or child who being sons or a son should attain the age of twenty-one years or being a daughter should attain that age or marry. Mrs. Johnson had five children, of whom four were daughters, namely, the defendants, Mary Cecil Johnson, Evelyn Dobree Johnson, Lilian Emily Johnson, and Hilda Catherine Johnson. At the date of the present summons they were aged fifty-nine, fifty-eight, fifty-five and fifty-three years respectively and none of them had ever married. She had one son, the defendant, Vernon Cecil Johnson, aged fifty-six years. Her husband died on June 13, 1920, and she never remarried. In exercise of the power in that behalf conferred on her by the marriage settlement, Mrs. Johnson, by a deed of appointment of February 18, 1926, directed and appointed that the trustees of the settlement should as from her death hold the property for the time being subject thereto on the trusts and subject to the following provisions :—(1.) In trust in equal shares for her four daughters and her son and so that the respective shares of her daughters (other than Hilda) should be subject to the provisions in the deed of appointment concerning the same respectively. (2.) The trustees were to retain the share of Mary and stand possessed of the same and the income thereof upon trust to pay or apply such income to or for the maintenance, benefit, and support of Mary during her life, and, after her death, as to both capital and income, in trust for such of her children living at her (Mrs. Johnson's) death or born afterwards during the period of twenty-one years from her death as either should during the said period attain the age of twenty-one years or being female marry under that age or should be living immediately before the expiration of the said period, and if more than one in equal shares. (3.) Similar trusts were declared as to Lilian's share, and (4.) as to one half of Evelyn's share. (5.) If no part of the share appointed to Mary, Lilian and Evelyn should become vested absolutely under the trusts mentioned in a child of such daughter the trustees were to hold the share which should so fail to vest and the income thereof, but subject to the life interest therein of such daughter in trust for such of them, Mary, Lilian and Evelyn, as should be living at the date of the determination of such life interest, and for Hilda in equal shares, but so that any share accruing to any of them, Mary, Lilian, and Evelyn, should be retained by the trustees, and should, with the income thereof, be held on the trusts applicable to their original shares. (6.) Notwithstanding anything thereinbefore contained, if the net income in any year remaining after payment of income tax of the share of any of them, Mary, Lilian, and Evelyn, in the trust property during their respective lives should not amount to the sum of 400*l.*, the trustees were to raise the deficiency out of the capital of such share and pay or apply the same to or for the maintenance, support and benefit of such daughter. Mrs. Johnson then appointed trusts on which the share of her son was to be held, and reserved to herself the power by deed or will wholly or partially to revoke the appointments and to make fresh appointments. Mrs. Johnson died on February 9, 1927. By her will dated February 18, 1926, and proved on February 18, 1927, she confirmed the directions and appointments made by the deed of appointment, and devised, bequeathed, and appointed all the residue of her property real and personal to her trustees on trust to sell and convert the same into money and directed that they should stand possessed of the trust fund so constituted in trust in equal shares for such of her five children as should be living at her death, but so that the respective shares of Mary, Lilian, Evelyn and Vernon should be retained by her trustees on the like trusts in all respects as were by the deed of appointment directed and appointed concerning their respective shares in the property, subject to the trusts of the marriage settlement. Shortly after the death of Mrs. Johnson, Hilda's share was paid and transferred to her and the investments and property representing the other children's share in Mrs. Johnson's residuary estate were transferred pursuant to a direction in her will to the trustees of the marriage settlement. In 1943, owing to the incidence of income tax the net income of a share was only about 200*l.*, and the direction to make up each of the three daughter's shares to 400*l.* net out of capital, which was imperative in terms, prima facie had become operative. The present summons, which was taken out by the plaintiff, the trustee of the settlement, raised the questions (1.) whether this direction was valid, or whether it was void as infringing the rule against perpetuities, and (2.) whether the gift over of Mary's share after her death in the event of no child of hers taking an absolute interest was wholly bad, or was bad to some, and, if so, what extent, as infringing the

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rule against perpetuities, and, if and so far as such gift over was bad, whether such share, or what part of it, would form part of her estate or pass under the trusts declared in default of appointment by the settlement.

Eardley-Wilmot for the plaintiff.

Horace Freeman for the defendant, Mary Johnson.

H. H. King for the defendant, Hilda Johnson.

Russell Gilbert for the defendant, Vernon Johnson.

The arguments and the authorities cited are fully stated in the judgment.

Cur. adv. vult.

July 20. Cohen J. read a judgment in which he stated the facts, and continued: Mr. Freeman, for Mary, relies on the decision of Russell J. in *In re Cassel* (1). In that case the headnote is as follows: "By his will the testator bequeathed "' Brook House and contents' and the stables held therewith, "the leases of which would expire in 1995, to trustees upon "trust to permit his granddaughter E. to have the use and "enjoyment thereof during her life, and after her death upon "trust for such one or more of her children or issue as she "should by will or deed appoint, and in default of such appointment for the first of her sons, or, failing any son, the first "of her daughters attaining twenty-one. Subject to these "trusts the trustees were to hold ' Brook House and contents' "upon similar successive trusts in favour of (1.) his granddaughter R. and her family, (2.) his nephew and his family, "and (3.) his niece and her family. The testator then directed "that: ' the rent outgoings rates and taxes for the time "' being payable in respect of the said messuage and premises "' and keeping the same and the contents thereof insured "' against fire and burglary and in a proper state of "' preservation shall be always paid by my trustees out of "' the income of my residuary personal estate.'" Russell J., in upholding the validity of that direction, said (2): "True "it is that assuming the leases remained unsold, the interest "of the person or persons absolutely entitled might enure "beyond the period of lives in being and twenty-one years "after; and it was suggested that this possibility would "avoid the clause. In my opinion this suggestion is unsound. "The perpetuity rule is concerned with the creation and

(1) [1926] Ch. 358. (2) Ibid. 368.

"vesting of interests, not with their duration. If the interest "must necessarily arise and be vested within the period, its "duration beyond the period is no infringement of the rule. "As is pointed out in Gray on Perpetuities, 3rd ed., p. 207, an "interest is not obnoxious to the rule if it begins within lives "in being and twenty-one years, although it may end beyond "them. In other words the rule prohibits vesting outside "the period. It does not prohibit distribution beyond the "period. It was, however, further argued that the uncertainty "of the quantum of the annual sum rendered the disposition "void, because the exact quantum of the interest could not be "ascertained within the limit of the rule. This contention, if "sound, would produce far-reaching results. A bequest of an "annuity of 100*l.* per annum for 1000 years to A. for life and "after his death to any wife of his for her life and after her "death to A.'s children for life would be good; but if given "free of tax would be bad, for the actual amount payable to "the children might not be ascertainable within the perpetuity "period. The answer seems to me to be that the interest arises "and is vested during the period, and that although the amount "necessary to satisfy it is expressed in uncertain terms it is "always capable of being rendered certain; and that the whole "property (that is to say the interest in question and the "property which is subject to that interest) is vested in some "person or persons during the necessary period."

Mr. Freeman argues that the position is exactly the same here. According to him, Mary's right to have her income made up to 400*l.* per annum vested within the period allowed by the rule against perpetuities, and it is immaterial that distribution may continue beyond the prescribed period and that the amount, if any, to be distributed cannot be ascertained until each period of distribution arrives. Mr. King, for Hilda, and Mr. Gilbert, for the son, distinguish *In re Cassel* (1) on the ground that in that case the right vested immediately and sums became immediately payable under the bequest then under consideration, the uncertainty being only as to the quantum that would have to be paid. In the present case nothing, they say, may be payable at all, and the whole right is contingent on an event which might never occur and certainly might not take place within the prescribed period, that is, the event of such an increase in the rate of income tax as would reduce the net income below 400*l.* per annum. On this basis,

(1) [1926] Ch. 358.

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Johnson's Settlement Trusts, *In re.*

McClure *v.* Johnson.

to quote the words of Kay J. in *London & South Western Railway Co.* v. *Gomm* (1)—which were approved by the Court of Appeal although his decision was reversed on another ground,—Mary's right is "a present right to an interest in property "which may arise at a period beyond the legal limit but is void "notwithstanding that the person entitled to it may release it."

This argument is, in my judgment, well founded, and it is supported by the decision in *In re Whiteford* (2). In that case a tenant for life had, in the events which happened, a power of appointment among her four sons, one of whom was of unsound mind. She exercised that right, and I will now read from the judgment of Neville J. (3) "directing the trustees to hold "two fifth parts of the funds subject to the trusts of the "marriage settlement and to apply the whole or so much of "the income of such two fifths 'as shall be required for making "'up the total income from all sources of the said Walter "'Whiteford to the sum of 200*l.* per annum in such manner as "'the said' trustees 'shall in their uncontrolled discretion "'think proper and most beneficial for the maintenance "'support and comfort of the said Walter Whiteford during "'his life and to divide the residue (if any) of such income "'equally between my other four sons.' That is the appointment which I have to consider. It is obviously an appointment of an interest among five persons, and the question I "have to determine is: Is it a vested interest or is it a contingent interest? On the one side it is argued that it depends "upon the happening of a contingency. On the other side it is "argued that it is a vested interest from the death of the "appointor, although the amount of income to be received by "any one of the five could only be ascertained from year to "year and might have to be ascertained after the expiration "of twenty-one years. I think the question really is whether "you can have a vested interest depending in whole or in part "upon the happening of a particular event. It seems to me "that to say you can is to state what is a contradiction in "terms, because the thing cannot be both vested and contingent. "The contingency really is the amount of the yearly income of "the appointee, which may involve the payment of the whole "income of the two fifths in one year and none of it in the next. "It seems to me that is a contingency affecting the payment to "the other four takers because as one share is reduced the other

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(1) (1881) 20 Ch. D. 562, 573.

(2) [1915] 1 Ch. 347.

(3) Ibid. 351.

"is increased by the same amount, and consequently the other "four sons may as well as the first appointee get either something or nothing in each year. It is an interest of a peculiar "kind, but it seems to me to be essentially a contingent gift, "and a gift of which it is impossible to say that it vested in "any particular person." I could not, I think, decide this point in favour of Mr. Freeman's client unless I take the view, which I am not able to do, that *In re Whiteford* (1) is inconsistent with *In re Cassel* (2) and I have to decide which to follow.

Mr. Freeman finally argued that the bequest was in substance a bequest to Mary of an annuity free of tax, and that such bequest would, as stated by Russell J. in the passage which I have read from *In re Cassel* (2), be valid. I will assume in Mr. Freeman's favour (*a*) that the bequest could have been framed as a gift of an annuity free of tax, and that, so framed, it would be valid, but I must bear in mind the important principle of construction which is stated by Lord Greene M.R., in *In re Legh's Settlement Trusts* (3) in the following terms: "The will must be construed without reference to the rule "against perpetuities. If upon the true construction of the "language used the legal character of the interest created is "one which attracts the operation of the rule, it is immaterial "that this result might have been avoided by the use of "different language creating an interest different in legal "character though the same in practical effect. Thus in a gift "upon trust to pay the income to A. during his life and after "his death to transfer the capital to B. if he shall be then "living, B.'s interest is contingent and will fail if A.'s death "is an event falling outside the limit permitted by the rule. "On the other hand, if the gift to B. is in terms absolute with "a gift over in the event of his predeceasing A., his interest "will be a vested one and the rule will not apply, notwithstanding that the practical result in the two cases will be the same. "The rule is strict and highly technical in its operation and the "temptation to construe words in such a way as to exclude its "application is one which must be firmly resisted." As I construe the appointment in the case before me, Mrs. Johnson appointed a life interest in income and a contingent interest in capital. To construe the appointment as the gift of an annuity of 400*l.* per annum free of tax charged on capital as well as income, plus a further gift of the surplus (if any) of the income of each year would, in my judgment, be doing unjustifiable violence to the language of the appointment.

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(1) [1915] 1 Ch. 347.
(2) [1926] Ch. 358.
(3) [1938] Ch. 39, 44.

I must, therefore, declare that the direction contained in the deed of appointment February 18, 1936, under the hand and seal of Josephine Emily Johnson and purporting to be made under the power of appointment conferred on her by the settlement for the raising out of the capital of the share of the defendant, Mary, in the trust fund constituted by the marriage settlement if the sum by which the net income of that share in any year during the life of the said defendant should fall short of 400*l.* is bad as infringing the rule against perpetuities or otherwise; and that the whole of such sum should be raised out of the capital of the share of the said defendant in the residuary estate of the said Josephine Emily Johnson. The last part of the declaration is, of course, due to the fact that it is not disputed that the direction is valid so far as the will fund is concerned.

I now turn to the second question, which is whether the gift over of Mary's share after her death contained in the deed of appointment in sub-cl. (5.) of the deed in the event of no child of hers taking an absolute vested interest is wholly bad, or is bad to some, and what, extent as infringing the rule against perpetuities, or otherwise, and, if and so far as such gift over is bad, whether such share or sum, or what part of it, will, in that event, on her death form part of her estate or pass under the trusts declared in default of appointment by the settlement. A similar question may arise as to the shares of Lilian and Evelyn, but no separate question has been raised thereon, as it is agreed that my decision in the case of Mary will govern the case of the other two shares. The question is a future question, but, having regard to the fact that Mary, Evelyn and Lilian are all unmarried and that the youngest of them is fifty-five, it is practically certain to arise. I am told that it is important to them to know what rights they have in order that they may be able to deal therewith, and in these circumstances I have agreed to determine the question.

It is common ground that, on the first branch of this question, this case is governed by *In re Legh's Settlement* (1), and that I am bound to declare the gift over is wholly bad, since none of the appointees had been born at the date of the settlement under which the appointment was made, and the interests of the survivors are, therefore, contingent on an event which will

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(1) [1938] Ch. 39.

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not necessarily occur within the period allowed by the rule against perpetuities. That being so, I have to determine whether there is an absolute gift in the first instance to Mary which remains in full force and effect now that the gift over has gone, or whether there is no absolute gift but merely a whole system of trusts including only in the first instance a life interest to Mary. Mr. Gilbert relied on the decision in *Rucker* v. *Scholefield* (1), where Page Wood V.-C. stated the principle to be applied as follows (2): "In all cases of this "kind the question turns upon the language in which the "appointment is attempted to be made. If you find a clear "and definite gift of the property to be appointed, and then, "engrafted upon that, subsequent provisions directing the "fund to be settled, so as to shew that the purpose was, first, "to make the gift to and for the benefit of the person named, "and then to have the fund settled; in a case of that kind, if "the limitations of the proposed settlement are such as cannot "become operative, the first absolute gift is held to take effect "without restriction. So, if you find a clear gift followed by "words which affect to divest it, and the limitations over are "inoperative, then the Court will uphold the gift, striking out "the limitations which cannot have any legal effect. But if "the words of the original gift are coupled with the whole "series of limitations over, so as to form one system of trusts, "then all that can be done is to give effect to so much of the "limitations as may be consistent with law. The question is, "to which of these two classes the instrument under considera"tion belongs. The trusts declared by the deed of appoint"ment are, first, 'to appropriate one fifth of the principal to "'and for and for the benefit of' each of the daughters "exclusively of the other children; and if these words stood "alone, they would suffice to vest the absolute interest in the "five daughters; but the clause runs on thus, 'and to pay "'and apply the interest, dividends and annual proceeds of "'each such one-fifth part or share unto or permit the same to "'be received by each and every of the said several children "'for her own sole and separate use'; 'and upon trust from "'and after the decease of each such daughter to pay, apply "'and dispose of the said fifth part or share of such daughter "'so dying unto and amongst the children of such daughter'; "and then follow the limitations which are clearly bad. Now, "I confess, that upon that language I feel compelled to hold

(1) (1862) 1 H. & M. 36. (2) Ibid. 41.

"that the trust for the daughters is for their lives only. The "appointment is made in this form: The trustees are first "directed to stand possessed of the fund 'upon the trusts "'following, that is to say, upon trust,' then follow the trusts "I have read. The reference to the trusts following must be "considered to take in all the trusts following as they do in "one connected series. It is impossible to stop after the first "part, which, if it stood alone, would no doubt confer absolute "interests on the daughters; but you must take the reference "to be to the whole system of trusts, including the restriction "of the daughters' interests to life estates, and the gifts over "to their children. This is not the case of a good appointment "being made, and then followed by an attempt to engraft an "invalid restriction upon it. There can be no doubt that the "gifts over are void, because they extend to issue generally, "and are not confined to issue born within the lifetime of the "survivor of the appointors. The result is that each daughter "took a life interest in one-fifth for her separate use, and, "subject to that the fund goes as upon default of appoint-"ment."

In some respects that case is like the one I have to decide, in particular in that the trustees are first directed to hold the fund " upon the trusts and subject to the following provisions," but there is the salient difference that in the present case the whole fund is not settled by the appointment and that the gift to Hilda who, it is admitted, takes her share absolutely is comprised in the same gift as the gift to her sisters and her brother. In these circumstances I think I am bound to hold that the effect of the words " in trust in equal shares for my "daughters Mary Lilian Evelyn and Hilda and my son Vernon " was a clear and definite appointment to each of one-fifth of the appointed property, and that the intention of the testatrix was to make a gift to and for the benefit of each of them, and then, except in the case of Hilda, as a separate direction to have each appointed share settled. The case, therefore, falls within the first of Page-Wood V.-C.'s two classes, and I must declare that Mary's share will, in the event of no child of her's taking an absolute vested interest therein on her death, form part of her estate.

Solicitors: *Travers Smith, Braithwaite & Co.*

H. L. L.

In re GOSSET'S SETTLEMENT.

GRIBBLE *v.* LLOYDS BANK.

COHEN J.

1943

July 9.

Settlement—Limitation of tenancy in tail—Remainder vesting in children of daughter—" First and other sons "—Implication of successive, not concurrent, interests.

By a strict settlement of real estate made in 1876 the property was limited to the use of the settlor's eldest son for life with remainder to his first and other sons successively according to seniority in tail male. Similar limitations were created in favour of the second and other sons, and then the daughters of the settlor successively for their lives, and their issue in tail male, but in the limitation to the first and other sons of the second and other younger daughters of the settlor the word " successively " did not occur :—

Held, that the expression " first and other sons " when used in creating an estate in tail male, whether in a will or in a deed, implied that they were to take successively according to seniority, and therefore, when on the death of the last tenant for life the only male issue entitled in remainder were two sons of a younger daughter, the elder became entitled in possession.

Cradock v. *Cradock* (1858) 4 Jur. (N. S.) 626, applied.

ADJOURNED SUMMONS.

By a strict settlement of real estate made in 1876 by the settlor, Arthur Gosset, certain lands and hereditaments which had since been sold and were now represented by a sum of 1900*l.* invested in Queensland stock were limited to the use of the testator's eldest son, Arthur Wellesley Gosset, for life without impeachment of waste, with remainder "to the use "of the first son of the said Arthur Wellesley Gosset and of "the heirs male of the body of such first son lawfully issuing "and in default of such issue to the use of the second and "every other son and sons of the said Arthur Wellesley Gosset "severally successively and in remainder according to their "respective seniorities and of the several and respective "heirs male of the body and bodies of all and every such son "and sons lawfully issuing the elder of such sons and the heirs "male of his body issuing being always to be preferred to "and to take before the younger of such sons and the heirs "of his and their body and respective bodies issuing and in "default of such issue." There were similar provisions with regard to the second, third and fourth sons of the settlor, and the settlement then provided that, in default of the issue of any son, the property was to be held "to the use of the "first daughter of the said Arthur Gosset for life and after her "decease to the use of her first and other sons and of the heirs "male of the body and bodies of such first and other sons "successively and in remainder and in default of such issue "to the use of the second and every other daughter and "daughters of the said Arthur Gosset severally successively "and in remainder according to their respective seniorities "and after her and their decease to the use of her and their "first and other sons and of the several and respective heirs "male of the body and bodies of all and every such son and "sons lawfully issuing the son and sons of the elder of such "daughters and the heirs male of his and their body and "respective bodies issuing being always to be preferred to "and to take before the younger of such daughters and before "the son and sons of the younger of such daughters and the "heirs of her and their body and respective bodies issuing "and in default of such uses to the use of the said Arthur "Gosset his heirs and assigns for ever."

In the limitation, therefore, to the sons of younger daughters the word "successively" did not occur. The settlor had four sons and eight daughters. None of the sons left any male issue surviving him, and only one daughter was married. On the death of the last tenant for life the tenancy in tail vested in favour of the son or sons of the married daughter. In 1942 the property was disentailed. The summons asked whether the estate was limited only to Lancelot Shadwell, the elder son of the married daughter, or whether the elder son and his brother were entitled jointly. The elder son died after the issue of the summons and Lloyds Bank was the executor of his will.

Rawlence for the plaintiff.

H. A. Rose for Lloyds Bank. The form of gift to the "first "and other sons" implies successive, not concurrent, interests. This is the rule first stated in *Lewis* v. *Waters* (1), which was approved by Eve J. in *In re Harcourt* (2), and afterwards in *Cradock* v. *Cradock* (3): see also Jarman on Wills, 7th ed., vol. iii., p. 1802, and Theobald on Wills, 9th ed., p. 347. Sir Arthur Underhill in the preface to his Interpretation of Wills and Settlements, 1st ed., says that the rules of

(1) (1805) 6 East. 336.

(2) [1920] 1 Ch. 492.

(3) (1858) 4 Jur. (N. S.) 626.

interpretation are the same for deeds as for wills. The scheme of the settlement throughout provides that the property shall go to the eldest son as tenant in tail, and the fact that the word "successively" has not been repeated in the final limitations to the issue of younger daughters makes no difference. Any doubtful or ambiguous expression should be construed so as to accord with the general scheme of the instrument. It is the "abridged language of conveyances": per Grose J. in *Cradock* v. *Cradock* (1). In *Honywood* v. *Honywood* (2) the language was different. *Cradock* v. *Cradock* (1) was approved by Eve J. in *In re Harcourt* (3).

Myles for the defendant, the younger son of the married daughter. Under the limitations of the settlement strictly construed the two sons of the married daughter became entitled to concurrent interests in the settled property. This is a deed, not a will, and deeds must be construed more strictly than wills. The rule laid down in *Cradock* v. *Cradock* (1) as applicable to wills has never been applied to deeds. Here the language in the limitations to the children of daughters after the eldest daughter, contemplates a plurality of persons to take. The word "successively" must be assumed to have been deliberately omitted, and should not be implied because it has been used in previous limitations. [*Honywood* v. *Honywood* (4), *de Windt* v. *de Windt* (5), and *Surtees* v. *Surtees* (6) were referred to.]

Cohen J. It is clear that the effect of the settlement as regards the limitations in favour of the eldest and other sons and the eldest daughter of the settlor for their lives and their issue in tail male is to create successive interests in order of seniority. It is only when the limitations in favour of the second and younger daughters and their issue are reached that it is said that any ambiguity arises.

The question is whether on the married daughter's death her elder son became entitled as tenant in tail male in possession or whether he and his brother took interests as joint tenants or tenants in common. If the elder son became entitled as tenant in tail male, he executed a disentailing deed before he died. My attention has been called to a number of authorities dealing with the construction of

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(1) 4 Jur. (N. S.) 626.
(2) (1866) 89 L. T. 235.
(3) [1920] 1 Ch. 492.
(4) 89 L. T. 235, 378.
(5) (1866) L. R. 1 H. L. 87.
(6) (1871) L. R. 12 Eq. 400.

COHEN J.

1943

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limitations similar to those I am considering. They are all of them to be found in wills. They leave me in no doubt that, were I construing a will, I should be bound to hold that the interests were successive and that the elder son became entitled to the property as tenant in tail male. Mr. Myles, however, points out that a deed is construed more strictly than a will. I agree, and I must, therefore, see whether there is to be derived from the cases any general principle of construction which is applicable not only to wills but also to deeds. The important words in the limitation I am considering are the words "first and other sons," and I think that Mr. Rose is right in saying that there is a general principle of construction not confined to wills which binds me to hold that these words connote successive interests.

That principle is, in my opinion, established by *Lewis* v. *Waters* (1). In that case, according to the headnote, "under "a devise to D. O., the testator's eldest son, for life, remainder "to trustees, etc., remainder to the first and other sons of his "said eldest son and their heirs, and for want of such issue "to the testator's second son, J. O., etc., with like remainders "to his first and other sons ; and for want of such issue to the "testator's own right heirs : held, that the first and other "sons of D. O., the eldest son, took estates tail in succession "and consequently the remainders over vested and were not "contingent and defeated upon the event of D. O. having a "son who died in the lifetime of D. O. ; and, therefore, that "D. O. having died without any son living at his death but "leaving daughters, a son of J. O. was entitled to take in "preference to such daughters of his elder brother." The judges were unanimous in holding that the limitation to "the first and other sons of D. O." conferred successive interests. Grose J. said (2) ; "The limitation to 'the first and "'other sons' imports that they were to take successively "according to priority of birth ; it is the abridged language "of conveyancers. And then the words 'for want of such "'issue,' referring to the antecedent limitation to the first and "other sons of David and their heirs, will give them estates "tail, according to all the cases, and will vest the remainder "to John Ormond, the brother of David." It appears clear from this judgment that, in the view of Grose J., the words "first and other sons" in conveyances, and not merely in wills, do import the idea of successive interests. That being so, I

(1) 6 East. 336.

(2) Ibid. 345.

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think I am bound to place the same meaning on those words in the limitations in the deed before me. *Lewis* v. *Waters* (1) was followed in *Cradock* v. *Cradock* (2) and other cases. I will not refer to those cases in full, but I would like to adopt the observations which Stuart V.-C. made in *Cradock* v. *Cradock* (2) as applying to this case. In my view, the construction which I am placing on this deed gives a meaning and effect to every word of the language which the settlor has used, and the language of the settlor, which gave the estate to "the first and other sons" is as much answered by giving to all in succession as in any other way. I am satisfied that, if there be a doubt as to the meaning of those words, the construction I am adopting is the only construction which will bring the particular limitation into accord with the consistent scheme to be found in the settlement as a whole. My attention was directed to two cases which were said to be authorities the other way: *Surtees* v. *Surtees* (3) and *de Windt* v. *de Windt* (4), but in neither of them were the words "first and other sons" or any words like them used. They are clearly distinguishable from the case with which I have now to deal.

I, therefore, declare that, on the true construction of the settlement, the property thereby settled and now represented by a sum of stock was limited, subject to certain prior interests which have failed or determined, to the said Lancelot Horace Augustus Shadwell as tenant in tail male.

Solicitors: *Dimond & Son; Andrew, Purves, Sutton & Creery; Robins, Hay & Waters.*

(1) 6 East. 336.
(2) 4 Jur. (N. S.) 626.
(3) L. R. 12 Eq. 400.
(4) L. R. 1 H. L. 87.

H. L. L.

COHEN J.

1943

June 22, 23, 25.

In re PRATT'S SETTLEMENT TRUSTS.

McCULLUM *v.* PHIPPS-HORNBY.

Power of appointment—Exercise of power in favour of eldest son—Gift over to younger children—Validity of appointment—Gift over void as infringing rule against perpetuities.

By a marriage settlement made in 1854 the wife directed that property should be held, subject to life interests to herself and her husband, on trust for the children or other issue of the marriage as she and the husband should appoint and, subject to the appointment and so far as it should not extend, in trust for all the children who should attain the age of twenty-one years or, being daughters, marry, in equal shares. There were four children of the marriage, three being sons and the youngest a daughter. In 1886, the wife and husband, on the marriage of the eldest son, irrevocably appointed the property, subject to their own life interests, to be held, subject to raising portions for the younger children, on trust for the eldest son, his heirs, executors, administrators and assigns ; if he should die without leaving issue living at his death, in trust for the second son, his heirs, executors, administrators and assigns ; if he should die without living issue, in trust for the third son, his heirs, executors, administrators and assigns ; and, if he should die without living issue, in trust for the daughter, her heirs, executors, administrators and assigns. By a marriage settlement of the same date the eldest son settled all his estate and interest in the property, subject to the interests of his parents, on trust for himself for life, with remainder to his wife for life, and, on the death of the survivor, on trust for their children who attained the age of twenty-one years or, being daughters, married, in equal shares. In 1897 the wife (the settlor of 1854) died, and in 1901, the husband died. By July, 1933, all the sons were dead, and none of them had left issue living at his death. After the death of the eldest son in June, 1933, funds which represented part of the settled property were transferred to the trustees of his marriage settlement. By January, 1943, the widows of the eldest and second sons were dead, and the widow of the third son had re-married. At the date of this summons, she and the daughter were alive, and were parties to the summons :—

Held, (1.) that the rule in *Doe d. Blomfield* v. *Eyre* (1848) 5 C. B. 713, that where there is an absolute gift followed by a gift over on the happening of a certain event the prior gift is defeated on the happening of the event although the gift over fails, does not apply to the case where the gift over which is to defeat the prior gift is void for remoteness, since the law refuses permission to await that event for any purpose, so that the prior gift must, of necessity, remain absolute and, accordingly, (2.) that the absolute appointment of 1886 in favour of the eldest son was of full force and effect although the gift over was admittedly void as infringing the rule against perpetuities.

In re Brown and Sibly's Contract (1876) 3 Ch. D. 156, followed.

COHEN J.

1943

PRATT'S SETTLEMENT TRUSTS, *In re.*
McCULLUM *v.* PHIPPS-HORNBY.

ADJOURNED SUMMONS.

By a declaration of trust executed on a marriage on February 27, 1854, there were reserved a life interest in the settled property to the wife and, after her death, a protected life interest to the husband. Subject to those life interests, the proceeds of the sale of the settled property were to be held on trust for such of the children or other issue of the marriage as the husband and wife during their joint lives should by deed appoint, and, in default of and subject to the appointment and so far as it should not extend, on trust for all their children who should attain the age of twenty-one years, or, being daughters, marry, in equal shares. There were three sons and a daughter of the marriage who all attained the age of twenty-one years. On June 25, 1886, the husband and the wife, on the marriage of their eldest son, irrevocably appointed that, subject to their respective life interests therein, the settled property and the proceeds of sale thereof should be held on trust to raise portions for their younger children and, subject thereto, in trust for the eldest son, his heirs, executors, administrators and assigns; if he should die without leaving issue living at his death, on trust for the second son, his heirs, executors, administrators and assigns; if he should die without leaving issue living at his death, on trust for the third son, his heirs, executors, administrators and assigns; and if he should die without leaving issue living at his death, on trust for the daughter, her heirs, executors, administrators and assigns. By a marriage settlement of the same date, the eldest son conveyed and assigned to the trustees thereof all his estate and interest in the settled property, subject to the interests of the husband and wife therein, on trust to pay the income to the eldest son during his life, after his death to his wife, and, after the death of the survivor, on trust, as to both capital and income, for all the children or any the child of the marriage who, being sons or a son, should attain the age of twenty-one years, or, being daughters or a daughter, should attain that age or marry, if more than one in equal shares. On February 9, 1897, the wife died, and on March 9, 1901, the husband died. On November 24, 1918, the third son died, without leaving issue living at his death. On February 10, 1933, the second son died without issue. On June 16, 1933, the eldest son died without issue. At the date of this summons, the daughter and the widow of the third son were alive and were parties to the summons. The trust fund was then represented by certain property and by investments which shortly after the death of the eldest son were transferred to the trustees of his marriage settlement on the footing that, as the gift over was clearly bad as transgressing the rule against perpetuities, the irrevocable appointment of 1886 was good in so far as it gave an absolute interest to the eldest son. A question having been raised whether the ground on which the investments were so transferred was correct, this summons, which was taken out by one of the trustees for the time being of the settlement of 1854, brought that question before the court for decision.

Eardley-Wilmot for the plaintiff.

Charles Romer K.C. and *Raymond Jennings* for the trustees for the time being of the marriage settlement of the eldest son. The appointment in favour of the eldest son is absolute and is valid. The gift over is void as infringing the rule against perpetuities because it is limited to take effect on an event which may never happen, but that does not affect the validity of the absolute appointment: Jarman on Wills, 7th ed., vol. i., p. 277; *In re Brown and Sibly's Contract* (1); *In re Engels* (2). In *Doe d. Blomfield* v. *Eyre* (3) it was held that, where there is an absolute gift followed by a gift over on the happening of a certain event, the prior gift is defeated on the happening of the event although the gift over fails. The present case is analogous to *Lassence* v. *Tierney* (4), where Lord Cottenham L.C., said (5): "If a testator leaves "a legacy absolutely as regards his estate, but restricts the "mode of the legatee's enjoyment of it to secure certain "objects for the benefit of the legatee, upon failure of such "objects the absolute gift prevails; but if there be no absolute "gift as between the legatee and the estate, but particular "modes of enjoyment are prescribed and those modes of "enjoyment fail, the legacy forms part of the testator's estate, "as not having in such event been given away from it": see also Farwell on Powers, 3rd ed., p. 343; also p. 348, where *Doe d. Blomfield* v. *Eyre* (3) is dealt with; Gray on Perpetuities, 4th ed., p. 260, s. 247; p. 521, s. 534.

Vaisey K.C. and *Myles* for the personal representative of the third son, his widow. The appointment giving an interest

(1) (1878) 3 Ch. D. 156.
(2) (1943) 1 All E. R. 506.
(3) (1848) 5 C. B. 713.
(4) (1849) 1 Mac. & G. 551.
(5) Ibid. 561.

to the eldest son is good. That interest, however, is defeasible, and, as he died without leaving issue living at his death, it is possible, first, that the appointment to him takes effect as an absolute appointment, or, secondly, that his estate is limited in the events which have happened to what is, in effect, a life interest, so that, on his death, the property goes over in default of appointment in accordance with the settlement of 1854; or, thirdly, that, as the property was not properly appointed, there is a resulting trust in favour of the settlor. The personal representative of the third son would benefit most if the third possibility prevailed, for she would then get two-sixths by representation. That possibility is not urged, however, for the court, in allowing it, would be countenancing a device for getting settled property back into the estate of the settlor. The matter is one of construction, and the real question is what was the intention of the settlor. The principle of *Doe d. Blomfield* v. *Eyre* (1) was followed in *In re Bold* (2). There has been a conspiracy of text-book writers to draft an exception to the rule in *Doe d. Blomfield* v. *Eyre* (1): see Sugden on Powers, 8th ed., pp. 512–514; also Jarman on Wills, 7th ed., vol. ii., p. 1410, where it is said: "But to "the rule thus laid down in *Doe d. Blomfield* v. *Eyre* (1) the "case of a gift over which is to defeat a prior devise in a too "remote event forms an exception, since the law refuses "permission to await that event for any purpose; so that the "prior gift must, of necessity, remain absolute." Also, at p. 1431 it is said: "The exception to the principle of *Doe* "*d. Blomfield* v. *Eyre* (1), namely, that it does not apply where "the gift over is void for remoteness, exists in the case of "personalty as well as realty; the result being that the prior "gift remains absolute." There is no exception to the rule in *Doe d. Blomfield* v. *Eyre* (1), and the text-book writers are mistaken. The rule was followed in *Robinson* v. *Wood* (3), although the court was strongly disinclined to do so. It is true that the gift over failed in that case because of the Statute of Mortmain, and the question of remoteness did not arise. Nevertheless, although the gift over in the present case is void for remoteness, the absolute appointment to the eldest son has, in the event, given him a life interest only, and the property will go as in default of appointment.

Wilfrid Hunt for the executors of the widow of the second son.

(1) 5 C. B. 713.

(2) (1926) 134 L. T. Rep. 595.

(3) (1858) 27 L. J. (Ch.) 726.

Roxburgh K.C. and *J. F. Bowyer* for the daughter. The appointment to the eldest son is good as far as it goes, but his interest is defeasible and cannot be absolute. The terms of the settlement of 1854 were " . . . . on trust for such of the "children or other issue of the marriage as the husband and "wife during their joint lives should by deed appoint, and, in "default of and subject to such appointment and so far as it "should not extend, on trust for all their children who should "attain the age of twenty-one years or, being daughters, marry, "in equal shares." Thus, it is clear that the daughter, on attaining the age of twenty-one years or marrying, attained a vested interest unless it was overridden by the exercise of the power of appointment. From the wording of the appointment it is abundantly clear that the appointors, in the event of the sons dying without leaving issue living at their death, intended her to have the property absolutely. The sons have all died without leaving issue living at their death, and it would not be right that the rule against perpetuities should be allowed to defeat the interest which the appointors obviously intended the daughter to have: *In re Abbott* (1). It must be admitted that *In re Brown and Sibly's Contract* (2) and many text-book writers are against that contention, but, whatever the reason why the gift over in default of issue cannot take effect, it cannot be because it is in the nature of an exception to the rule in *Doe d. Blomfield* v. *Eyre* (3). The real crux of the matter is to be found in Jarman on Wills, 7th ed., vol. ii., in the passage which has been cited from p. 1410. *Wainwright* v. *Miller* (4) supports the contention on behalf of the daughter, and also the contention that the alleged exception to the rule in *Doe d. Blomfield* v. *Eyre* (3) does not exist. The rule applies to the present case, with the result that, on the death of the eldest son without leaving issue living at his death, the gift in default of appointment contained in the settlement of 1854 took effect.

June 25. COHEN J. The transfer of the investments to the trustees of the marriage settlement was made (I may say in intelligent anticipation of the decision I am about to give) on the footing that the irrevocable appointment was good in so far as it gave an absolute interest in the settled property to the eldest son, but that the gift over on his death was bad as transgressing the rule against perpetuities, and, consequently, failed, together with any subsequent limitations. It is common ground that this view is right in so far as it assumes that the gift over on his death, without leaving issue, was bad as transgressing the rule against perpetuity. It is suggested, however, that the gift over, though invalid, may have the effect, in the event which happened, of cutting down the interest of the eldest son to a life interest and that the property passed on his death as in default of appointment. The argument that there is a resulting trust in favour of the settlors has been abandoned, I think wisely, because, if it were to be upheld, the way of a settlor who regretted having settled his property and desired to secure control of it would be too easy.

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(1) [1893] 1 Ch. 54.
(2) 3 Ch. D. 156.
(3) 5 C. B. 713.
(4) [1897] 2 Ch. 255.

Mr. Romer, who contends that the absolute interest of the eldest son remains in force, relies, in support of his contention, on *In re Brown and Sibly's Contract* (1). The headnote in that case is: "By marriage settlement, dated in 1821, real "estate was conveyed to trustees to the use of the settlor, "W. M., for life, and after his death to the use of all or any "exclusively, of the children, grandchildren, or other issue of "W. M. (to be born before the appointment was made), as he "should by deed or will appoint, and in default, to the uses "therein declared. By will, dated in 1867, W. M. appointed "the estate to his son W. E. M. in fee, but in case he should "have no child who should attain twenty-one, then to the "settlor's grandson, W. M. B. in fee: *Held*, that the executory "gift over to W. M. B. was void for remoteness." The headnote does not make it clear that the absolute gift remained in force, but that appears clearly from the judgment of Malins V.-C., who says (2): "The point I have to decide under this settlement "is free from doubt. The law is settled, that where a person "takes property by virtue of the execution of a special or "limited power of appointment, he takes directly under the "instrument creating the power. Consequently, when W. "Metford made his will, it was the same as if the words he "there used had formed part of the settlement, and as if the "property had been conveyed by that settlement to trustees "to the use of himself for life, with remainder to the use of "his (unborn) son in fee, with a direction that in case his son "should have no child who should attain twenty-one, then "that the estate should, after the son's death, go over to the "settlor's grandson in fee. That is an attempt to make the

(1) 3 Ch. D. 156.

(2) Ibid. 159.

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McCULLUM *v.* PHIPPS-HORNBY.

"property inalienable for a period which might extend to "twenty-one years after the determination of the life of a "person not in being at the date of the settlement. The "law does not allow a man to tie up property for longer than "a life or lives in being and twenty-one years; and this is "clearly an attempt to do what is contrary to the law. I "need not do more than refer to my decision in *Stuart* v. "*Cockerell* (1), afterwards affirmed on appeal, which shows that "the law is as I have stated it." Then come the important words: "My opinion, therefore, is that the appointment by "the testator to his son in fee is good, and the attempt to "give the estate over is void. It is precisely the same as if a "man were to give property to his son for life, and after his "decease to his son's children, as tenants in common in fee, "with a proviso that if any of the children should die under "twenty-five the property should go over. In that case the "proviso carrying over the shares would be void. The gift "to the son in fee is therefore good, and the executory devise "over is void."

That is a direct decision in favour of the trustees of the eldest son's marriage settlement and the other trustee of the settlement of 1854, and it will be my duty to follow it unless it has been overruled or there is another decision of equal authority to the contrary effect, in which event I should have to decide which decision to follow. Mr. Vaisey and Mr. Roxburgh argued that such a contrary decision is to be found in *Doe d. Blomfield* v. *Eyre* (2). The facts and principle of the decision in that case are conveniently stated in Jarman on Wills, 7th ed., vol. ii., p. 1409, as follows: " . . . . M. S. having "an exclusive power of appointing lands by will amongst her "children, appointed them to her eldest son, J. B., in fee; "but if J. B., and his brother both died before her husband, "then she appointed the estate to her father-in-law (a stranger "to the power) in fee. J. B. and his brother both died in their "father's lifetime, and it was held . . . . that although the "father could not take"—I pause there to say "not being an "object of the appointment"—"yet the son lost the estate. "Parke B. delivered the judgment of the court, and after "premising that the question was the same, whether it arose "upon an ordinary devise or upon an appointment under a "power, he said, 'If a testator seised in fee were to devise a "'real estate to A. B. in fee and to direct that, in the event of

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(1) (1870) L. R. 5 Ch. 713.

(2) 5 C. B. 713.

"' A. B. dying in the lifetime of J. S., the estate should go over "' to a charity, it surely was perfectly clear that if A. B. should "' die in the lifetime of J. S., he, or rather his heirs, would lose "' the estate. The testator could not give to the charity "' without taking away from the devisee. The testator, "' therefore, in such a case, by his will said, "If A. B. dies in "' "the lifetime of J. S., I do not mean that he or his heirs "' "should any longer have the estate." That which defeated "' the estate of J. B. was the death of himself and his brother "' in his father's lifetime, not the giving over the estate to "' strangers.'" I need read from the report of the case, in addition to the passage I have read, only the concluding two sentences of the judgment of Parke B. In further elaboration of the passage I have read, as extracted in Jarman, Parke B. says (1): "The reason why John's representatives "cannot claim the property is, that his mother expressly "declared, that, in the event which happened, he should not "have it. How she would have disposed of it, if she had "known that she could not give it in the mode proposed by "her will, can only be matter of conjecture. One thing quite "certain is, that she has not expressed any intention, that in "the events which have happened, John should take: and, "as he could only be entitled by virtue of an expressed intention in his favour, we think that he fails to establish any "right." In that case the gift over failed because it was in favour of a person not an object of the power.

That decision was followed with evident reluctance by Kindersley V.-C. in *Robinson* v. *Wood* (2) where the cause of the failure of the gift over was the Statute of Mortmain. Mr. Vaisey says that there can be no difference between a case where the gift over fails owing to the Statute of Mortmain and a case where it fails owing to the operation of the rule against perpetuities. Attractive as the argument is, I cannot accept it. It seems to me to be inconsistent with various decisions relating to wills, and, as stated by Parke B., there does not seem to be any difference in principle between the case of a devise and the case of an exercise of a power.

The cases to which I have referred are dealt with in the following passage in Jarman on Wills, 7th ed., vol. ii., p. 1431: "The exception to the principle of *Doe d. Blomfield* v. *Eyre* (3), "namely, that it does not apply where the gift over is void for

(1) 5 C. B. 713, 748.
(2) 27 L. J. (Ch.) 726.
(3) 5 C. B. 713.

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Pratt's Settlement Trusts, *In re.* McCullum *v.* Phipps-Hornby.

"remoteness, exists in the case of personalty as well as realty; "the result being that the prior gift remains absolute." I think that the true reason for the exception is correctly given in Jarman on Wills, 7th ed., vol. ii., p. 1410: "But to the rule thus "laid down in *Doe d. Blomfield* v. *Eyre* (1), the case of a gift over "which is to defeat a prior devise in a too remote event forms "an exception, since the law refuses permission to await that "event for any purpose; so that the prior gift must, of "necessity, remain absolute." I was referred to a number of other text-book writers who were, as Mr. Vaisey said, reluctant to accept the decision in *Doe d. Blomfield* v. *Eyre* (1) unless, at any rate, it was explained as it was in the following passage in Sugden on Powers, 8th ed., p. 514: "In the course of the "argument Parke, B., asked for a reference to any case of a "limitation to one and a conditional limitation over to a "person who could not take, as a corporation, etc., to which "it was answered from the bar that no doubt there were some "such cases—of that class were the cases of perpetuity; "whereupon Rolfe, B., said, That can hardly apply: the first "taker is clearly intended to take, and takes for ever unless "the estate can go over to another. His observation therefore "is confined to a case where the fee is first given and then there "is a gift over void for perpetuity, in which case the fee remains "in the first devisee and the gift over is simply void. But "this has no bearing upon the principal question, for here "the testatrix could by law declare her intention, that upon "the happening of the contingency, the devise to her son "should cease, whereas in the case put at the bar and answered "by the learned baron, the testator could not by law defeat "the first devise in the event which he provided for: the law "forbade the devise over, and therefore the first devise "remained unaffected by it." That passage seems to me to put on clear principles the exception to the rule in *Doe d. Blomfield* v. *Eyre* (1), to which effect was given in *In re Brown and Sibly's Contract* (2). *Wainwright* v. *Miller* (3) was relied on by Mr. Roxburgh. In my view, that case is irrelevant. The court decided that the particular gift was not void for remoteness. It would seem to me to have no bearing on the question as to the consequences which follow where a gift fails for remoteness. In my opinion, therefore, *In re Brown and Sibly's Contract* (2) is not inconsistent with the rule in *Doe d. Blomfield* v. *Eyre* (1).

(1) 5 C. B. 713.

(2) 3 Ch. D. 156.

(3) [1897] 2 Ch. 259.

One other observation I would make. The decision in *In re Brown and Sibly's Contract* (1) was given in 1876. It was a decision on which the title to property depended. The sanctity of such a decision was recognized in *Bourne* v. *Keane* (2), where the court refused to be hide bound, if I may so put it, by the principle that it must leave unfettered a rule to which effect had been given over a period of years. I need refer only to a passage in the speech of Lord Buckmaster, where he says (3): "From these authorities I collect the following "principles as applicable to such a question. Firstly, the "construction of a statute of doubtful meaning, once laid "down and accepted for a long period of time, ought not to "be altered unless your Lordships could say positively that "it was wrong and productive of inconvenience; secondly, "that decisions upon which title to property depends, or "which by establishing principles of construction or otherwise "form the basis of contracts, ought to receive the same protection." I have no doubt that *In re Brown and Sibly's Contract* (1) has been acted on on many occasions. It has certainly been acted on in the case before me, and in these circumstances, even if I were inclined to think it was wrongly decided—whereas in fact I think it is correctly decided in principle—I should hesitate to say so after this lapse of years. I must, therefore, declare that the absolute appointment in favour of the eldest son remains of full force and effect, and that the gift over is bad.

Solicitors: *Lee & Pembertons; Kenneth Wright & Johnson; Ralph Bond & Rutherford; Blundell, Baker & Co.*

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(1) 3 Ch. D. 156.
(2) [1919] A. C. 815.
(3) Ibid. 874.

K. R. A. H.

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May 17, 31; July 12.

In re SCHEBSMAN, DECEASED.

Ex parte THE OFFICIAL RECEIVER, THE TRUSTEE *v.* CARGO SUPERINTENDENTS (LONDON), LIMITED AND SCHEBSMAN.

Contract for benefit of third party—Performance by payment to third party against wish of obligee—Bankruptcy—Settlement—Avoidance—Settlement made within two years before bankruptcy—Agreement for payments to debtor's wife and daughter—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42, *sub-s.* 1.

The employment of the debtor by a Swiss company and its English subsidiary company ended on March 31, 1940, and an agreement which he made on September 20, 1940, with the two companies provided for certain payments being made by the English company to him over a period of years, so long during that period as he was living and, after his death within a certain period (which happened) to his widow, and in an event which, at the date of this motion, might or might not happen, to his daughter. The agreement provided in cl. 2: "In consideration of the agreement "which has already been made between the parties hereto the "English company also agree to pay by way of compensation for "the loss of [the debtor's] employment a sum of 5500*l.* to be paid "to the persons at the dates in the amounts and subject to the "conditions more particularly specified in the schedule hereto." The schedule began with a list of six sums, four of 1000*l.* each, and two of 750*l.* each. The first of them was to be paid for the year ending March 31, 1941, and the others for the years ending on the five succeeding anniversaries of that date. They amounted to the total of 5500*l.*, and the last payment was to be made for the year ending March 31, 1946. By cl. 4, the debtor agreed not to engage in any competing business for ten years from March 31, 1940. The schedule provided that, if he died on or before March 31, 1941, the company would pay his widow 500*l.* for each of the four years ending March 31, 1941, 1942, 1943 and 1944, and 375*l.* for each of those ending on March 31, 1945, 1946, 1947 and 1948; that, if he died during the conventional years 1941–1942, 1942–1943, 1943–1944, each ending on March 5, the payments should extend over the period ending March 5, 1948; that, if he died during the conventional years 1944–1945, 1945–1946, the payments were to cover the period ending March 5, 1950; that, if the widow died before March 5, 1950, the schedule should be read thereafter as if the name of the daughter appeared instead of that of the widow; and that the payments should cease on the death of the survivor of the debtor, the widow and the daughter. The debtor was adjudicated bankrupt on March 5, 1942, and died on May 12, 1942.

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Held, (1.) that under the agreement the debtor was neither a trustee nor an agent for his wife and daughter. (2.) That, as a matter of law, payment to the wife and daughter, who were strangers to the contract, was due performance of the agreement unless, on the true construction of the agreement, there ought to be implied a term entitling the debtor or his sequels in title to intercept the sums agreed to be paid to them. (3.) That, in determining whether, on the construction of the agreement, any such term should be implied, the legal consequences of non-performance were irrelevant. (4.) That, on the true construction of the agreement, no such term should be implied. Dictum of Lord Esher M.R., in *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147, 152, disagreed with. Dictum of Fry L.J., ibid. 157, agreed with. *In re Stapleton-Bretherton* [1941] Ch. 482, applied. (5.) That the agreement did not constitute a settlement, within s. 42, sub-s. 1, of the Bankruptcy Act, 1914, of any property belonging to the debtor, so as to entitle the trustee in bankruptcy to have paid to him all sums payable under the agreement, the debtor having become bankrupt within two years after the date thereof.

MOTION.

The facts sufficiently appear in the headnote.

By this motion the official receiver, as the debtor's trustee in bankruptcy, asked for a declaration that all sums payable under the agreement to the widow and, possibly, to the daughter, after the receiving order formed part of the estate of the debtor on the grounds that, although the sums were, by the agreement, to be paid to the widow or the daughter, the debtor always had the right to intercept them, which right was at the date of the motion in the trustee, and, secondly, that, if the debtor had not that right, the provision for his widow and daughter was a voluntary settlement made by him which was avoided under s. 42, sub-s. 1, of the Bankruptcy Act, 1914, because of his bankruptcy within two years of making it.

Pennycuick for the official receiver. After argument has been put forward on behalf of the widow and daughter, it will be necessary to refer, on behalf of the trustee, to the agreement which, the trustee alleges, existed between the debtor and the company, and, also, to certain authorities.

Denning K.C. and *G. R. F. Morris* for the widow and daughter. The widow and daughter are entitled to the payment of all sums which have fallen due under the agreement since the debtor's death. It must be conceded that the widow as such, cannot sue under the contract because she is not a

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party to it, but the debtor's legal personal representative can sue, as representing a party to the contract, and, on suing successfully, would be entitled to receive the full amount of the money due under the agreement, and not merely nominal damages: *Lloyd's* v. *Harper* (1); *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford* (*London*), *Ld.* (2); *West* v. *Houghton* (3), where only nominal damages were awarded, is no longer of authority. When received, the full amount is to be held for the widow and not for the creditors: *In re Flavell* (4). That case is the root of authority on this point, and was followed in *Ashby* v. *Costin* (5), *In re Davies* (6) and *Drimmie* v. *Davies* (7), and applied in *Parker* v. *Judkin* (8). Against the contention that the widow is so entitled is a dictum of Lord Esher M.R. in *Cleaver* v. *Mutual Reserve Fund Life Association* (9), but that dictum was not followed in *In re Burgess' Policy* (10), or in *In re Engelbach's Estate* (11). It was followed in *In re Sinclair's Life Policy* (12), which was distinguished in *In re Gordon* (13) and in *In re Webb* (14). There was, moreover, a dictum to the opposite effect by Fry L.J. in *Cleaver's* case (15). The argument of Professor Corbin, in an article entitled "Contracts for the Benefit of Third Persons" (46 Law Quarterly Review, p. 12), supports the present contention, though the proposition contended for is broader than that put forward by him. His article is directed to throwing doubt on the doctrine that two parties cannot by contract confer rights on a third person who is not a party to the contract. On the bankruptcy point, there was no settlement by the debtor of "property" within s. 42, sub-s. 1, of the Bankruptcy Act, 1914. If a person dies insolvent and the estate is then administered in bankruptcy, s. 42 does not apply. True, the estate here has not been administered in bankruptcy, but the widow is the administratrix and could at any moment apply for an order for administration in bankruptcy: *In re Gould* (16); Bankruptcy Act, 1914, s. 130, sub-s. 9. If there were a settlement here, it would follow that the debtor must have had some property of his own: *In re*

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(1) (1880) 16 Ch. D. 290.
(2) [1919] A. C. 801.
(3) (1879) 4 C. P. D. 197.
(4) (1883) 25 Ch. D. 89.
(5) (1888) 21 Q. B. D. 401.
(6) [1892] 3 Ch. 63.
(7) [1899] 1 I. R. 176.
(8) [1931] 1 Ch. 475.
(9) [1892] 1 Q. B. 152, 157.
(10) (1915) 113 L. T. 443.
(11) [1924] 2 Ch. 348.
(12) [1938] Ch. 799.
(13) [1940] Ch. 851.
(14) [1941] Ch. 225.
(15) [1892] 1 Q. B. 157.
(16) (1887) 19 Q. B. D. 92.

Ashby (1); *In re Mathieson* (2). In fact, however, before the alleged settlement he had no property. Anything of his in the nature of "property" that came into being did so merely by virtue of the agreement.

Raeburn for the companies. The companies have at all times intended that the widow shall benefit, and they consider themselves morally bound to her although there is nobody who can sue them for performance of the contract. Here there was no equitable assignment by the debtor to the widow, because the right to assign in equity property to come into possession of the assignor in future depends on the property coming into possession and ex hypothesi the property could never have come into possession of the debtor. It was never property over which the debtor or his personal representatives could have had a right of disposition. The undertaking to pay the widow was a purely contractual agreement by the English company. There was nothing which ever belonged to the debtor or ever could do so.

Pennycuick for the official receiver. There has been a settlement of property here, and it is avoided by s. 42, sub-s. 1, of the Bankruptcy Act, 1914. Under the agreement the English company covenanted, for valuable consideration from the debtor, to pay certain sums to the widow and, after her death, to the daughter. The debtor's estate is entitled to the benefit of that covenant: *In re Sinclair's Life Policy* (3), *In re Engelbach's Estate* (4); unless the court can find that the destination of the payments is an essential part of the bargain between the company and him: *In re Stapleton-Bretherton* (5), and on construction the court ought not to find that it was an essential part of the bargain that the widow should receive these payments personally. The companies' primary concern was that the debtor should be restricted from competition and from divulging confidential information. The debtor is entitled to insist on the strict terms of his covenant. When he entered into the agreement he became entitled to a chose in action. That is the settled property, and it consists of the obligation to pay money undertaken by the English company. The settlement is the assignment of that chose in action which was effected by the debtor simultaneously with the procuring of it, and the assigning of the interest took the form of choosing the wife and daughter to receive the payments for their own benefit. That is the settlement which is avoided by s. 42.

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(1) [1892] 1 Q. B. 872.
(2) [1927] 1 Ch. 283.
(3) [1938] Ch. 799.
(4) [1924] 2 Ch. 348.
(5) [1941] Ch. 482.

Denning K.C. replied.

Cur. adv. vult.

July 12. UTHWATT J. read a judgment in which he stated the facts and continued: In my opinion the debtor was not in any way a trustee for his wife or daughter. Trusts can arise only from the intention to create a trust expressed by or imputed to the person to be considered its founder, or from the acts, generally the wrongful acts, of the party to be charged as a trustee. There must be either an intention duly carried into effect, or facts which create an estoppel precluding the denial of trusteeship. There is not, I think, any other way of creating a trust. In this connexion I was referred to Professor Corbin's interesting article in the Law Quarterly Review, vol. xlvi. on "Contracts for the Benefit "of Third Persons" and have considered the cases to which he refers, but I am unable to see that they justify the conclusion at which he arrived that in some cases of the class now under consideration a fiction has been resorted to in order to raise a trust. The cases, no doubt, are hard to reconcile, but, to my mind, the explanation of them is that different minds may reach differing conclusions on the question whether the circumstances sufficiently show an intention to create a trust. Inferences as to intent may vary, as the cases on general charitable intent well show. In the present case there can be no question of any estoppel, and there is nothing, except the terms of the contract itself, on which to ground an inference that there was an intention to create a trust and that the intent was duly put into effect. With Romer J. in *In re Engelbach's Estate* (1) and Simonds J. in *In re Stapleton-Bretherton* (2), I do not think that any such inference can properly be drawn. The only inference I draw is the obvious one, that the parties thought the contract would be carried out.

Next, it is clear, and the contrary has not been contended, that the debtor, in making the contract, was not acting as agent either for his wife or daughter.

The result is as follows. The debtor was free to agree to release or vary the contract in any way he thought fit, and free to waive performance or to accept substituted performance.

The wife and daughter could not sue on the contract or require the debtor or, rather, his sequels in title, to sue. If the stipulated sums were not paid to the wife or daughter, the debtor's legal personal representative or other sequels in title could retain any damages that might be recovered and the widow and daughter could have no claim thereon. I find it unnecessary to express any opinion on the question whether more than nominal damages could be recovered. In respect of all these matters, the debtor's trustee in bankruptcy now stands in his shoes. With regard to the position of the wife and daughter, there is nothing, either in the contract or the circumstances, to suggest that the wife and daughter were not intended by both parties to take beneficially such sums as might be paid to them, and, indeed, everything points to beneficial ownership by them of such sums being intended.

The question then arises what, in law, is the effect of the instrument in its application to the sums agreed with the debtor to be paid to his wife and daughter. The question may be put in various ways. Was the company to be regarded as a mandatory of the debtor, authorized to make payment to the wife and daughter? Was payment to the wife and daughter only one of several permissible methods of performance of an obligation which was in substance an obligation to pay to the debtor? Ought there to be implied a term that the debtor was to have a right to intercept payments falling to be made to the wife and daughter? Ought the instrument, on its true construction in the light of the circumstances, to be read as if, in the covenant to pay to the wife, the words "or as [the debtor] may direct" were inserted after her name? Whichever way the question be stated, the point involved is the same. The last method of stating the question to be solved appealed to Simonds J. in *In re Stapleton-Bretherton* (1) and with his view I respectfully agree. Construction, as appears from the judgment of Simonds J., embraces the implied term. The result is that, where the instrument cannot properly be construed as involving the suggested phrase, performance may be duly made, and can be required to be made, only in accordance with the written terms. This conclusion can be displaced only if it be a rule of law that persons are unable to make a contract under which a payment is to be made to a third party to enure for the benefit of that third party, or if it be a rule of law that, in such a contract,

(1) [1941] Ch. 482.

exact compliance with its terms by the obligor is a breach of the contract where the obligee requires some other method of performance.

There are, in my opinion, no such rules of law. Third party contracts are not unknown in commerce, and they now frequently arise under pension schemes where employees having only contractual rights to a pension are authorized to allocate and do allocate a part of the expected pension to dependants. No lawyer would, I think, suggest that such contracts might not be duly made. The second supposed rule, again, need only be stated to be rejected. An obligor is bound only to perform his bargain according to the terms agreed or implied. Is there any reason for excluding third party contracts from the application of this principle ? I see none. Where the performance is to be made by payment to a third party, the treatment of the performance in the agreed manner as due performance, whatever changes of mind the obligee may undergo, does not involve acceptance of the view that the third party has rights under the contract—he has none—but is necessitated by adherence to the fundamental principle that the obligor is bound only to perform in the way agreed and cannot have some other method of performance put upon him at the wish of the obligee. The rule that the third party may not sue, and, therefore, has under the contract no rights, is, to my mind, irrelevant. What is relevant is that, subject to considerations of public policy, parties freely bargaining may make such contracts as they please, and are bound only to perform such contracts and none other.

The decision of Simonds J. renders it unnecessary for me to deal with the cases which may be thought to bear on the topic under consideration. I propose only to say that I disagree with the dictum of Lord Esher M.R. in *Cleaver* v. *Mutual Reserve Fund Life Association* (1) to the effect that, as between Maybrick's executors and the insurance company, the stipulation for payment to Mrs. Maybrick would have no effect, and I agree with the dictum of Fry L.J. in the same case (2) as to the effect of the contract, and that I regard the decision in *In re Engelbach's Estate* (3) as justified by the view that the insurance company were only mandatories of the parent to pay the sum assured to the daughter.

It was argued that the principle of the decision in *In re*

(1) [1892] 1 Q. B. 152, 157.
(2) Ibid. 157.
(3) [1924] 2 Ch. 348.

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Stapleton-Bretherton (1) was that, on the facts, the destination of the sums there in question was to the covenantor an essential part of the bargain and that, unless I was able to come to a similar conclusion in this case, the suggested term ought to be implied. I do not so read the judgment. The principle laid down is that unless, as a matter of construction, the covenant can be read as if the words "or as the covenantee may direct" were inserted in the covenant after the name of the payee, the only performance called for by the contract is that expressly stated in it. The application of the principle was that, where performance in accordance with the written terms is to the covenantor an essential part of the bargain, it was not right to make the implication. The search in *In re Stapleton-Bretherton* (1) was for the true intendment and meaning of the contract. No doubt, in approaching the construction of a contract, one has in mind that, in a matter which does not financially or otherwise really affect the obligor, he will have no particular views and would be willing to agree to any reasonable course directed to the performance of the substance of the bargain, and, indeed, might think that performance in some reasonable alternative manner at the request of the obligee was implicit in the bargain, but whether or not the suggested term is to be implied depends on the terms of the contract read in light of the relevant circumstances. It would be excluded by an express provision that payment was to be made to the stranger and in no other manner, even though the method of payment was of no importance to the obligor and the only question which would then remain for decision—a question which does not turn on the terms of the contract—would be whether the stranger received the sums for account of the obligee or on his own behalf. It may, I think, equally be excluded by the circumstances of the case, although the matter is not of importance to the obligor. The formal question is not: "Is the suggested "term to be excluded?" but: "Is the suggested term to be "implied?" and that is the way in which the matter was dealt with by Simonds J.

I now come to the question of construction. In construing the agreement it is not, I think, legitimate to take into account the consequences which follow in law from non-performance and to assume that the parties had knowledge of all the legal consequences of their bargain and non-performance of it and

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(1) [1941] Ch. 482.

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contracted with reference to them. Contracting parties are not troglodytes who regard a breach of contract as the normal and proper result of its making. They contract with a view to performance and not non-performance, and the contract should be construed accordingly. Moreover, the assumption of knowledge is probably untrue in fact, and a contract in the form of the present contract made with knowledge of the lack of elegance of the rules of English law with regard to the enforcement of third party contracts and on the basis that those rules were to determine its construction, is almost unthinkable. I, therefore, in construing the agreement exclude those rules from consideration. I may observe on the agreement that no further activities on the part of the debtor were called for by the deed, for the only consideration on the part of the debtor contained in it was an obligation to abstain from competing services. Indeed, the substance of the real consideration lay in his past services. He had played his part. His affairs were settled. Debts of his were to be paid and his policy was to be kept up. If the debtor failed to reap to the full the payments contemplated in his favour, his wife and daughter were provided for. The provision was to be for the living and not the dead. The total sums payable might vary with the date of the death of the debtor or of the survivor of his wife and daughter. It was the company, not the debtor, who made the proposition that the widow and daughter should be provided for. The company did, on my view of the facts, have in mind as a distinct part of the bargain they proposed, that payments expressed to be payable to the widow and daughter were to be made to them alone. And so also in my view did the debtor, attach whatever weight one pleases to the ineradicable desire of the ordinary man to keep his dependants under his thumb. The common intent directed to the point in issue which is to be inferred from the terms of the agreement, the circumstances in which it came into being, and the object to which it was directed, was that the wife and daughter alone should be the recipients of the sums expressed to be payable to them. To my mind, it is impossible, in these circumstances, to imply a term—for that is what it comes to—under which the debtor, or his sequels in title, were to have a right to intercept the payments. The provision for the widow and daughter had been made once and for all, not until further order by the debtor, and the whole matter had been completed. There is no uncertain answer if one applies the test suggested by MacKinnon L.J. in *Shirlaw* v. *Southern Foundries* (1926), *Ld.* (1). The intrusive bystander who interested himself in the bargain sought to be made and asked "If the debtor changes his "mind, is he to be able to lay his hands on the widow's money?" would certainly get a testy answer. It would not be "Of "course." The first point taken, therefore, fails.

The second point is based on s. 42, sub-s. 1, of the Bankruptcy Act, 1914, which provides that any settlement of property (not falling within certain categories which are out of the question in the present case) shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy. For the purposes of this point, it is assumed that the trustee fails on the first point.

The avoidance of the transaction as a whole against the trustee in bankruptcy does not, of course, interest the trustee, and the argument is that the transaction embodied in the agreement can properly be, and ought to be, split into two elements—first, that the debtor became entitled to a chose in action, namely, an obligation to pay a sum of money; secondly, an assignment of an interest in that chose in action effected by the debtor simultaneously with the acquisition by him of the chose in action, the interest assigned consisting in the selection of the wife and daughter as persons to whom payment for their own benefit might be duly made. That assignment is, it is argued, a settlement and is avoided by the section and the result desired by the trustee in bankruptcy is achieved. In my view, if the transaction can properly be split up in the manner suggested, the conclusion sought to be drawn by the trustee follows. With regard to the substance of the transaction, all the provisions made by the agreement find their origin and consideration in the past activities of the debtor and the promises by him as to his future conduct. He is ultimately the economic source of all the stipulations in the agreement, and the provisions made in form for the widow and daughter are provisions in respect of him. Further, the definition of property, contained in the Act, places no obstacle in the way of the argument, for, after defining property as including things in action, it proceeds to include "every "description of interest arising out of or incident to property "as above defined." A dissection of the transaction in the

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(1) [1939] 2 K. B. 206.

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manner suggested is, indeed, necessary if the trustee is to succeed on his contention under s. 42, for, as is clear from the terms of s. 42, and the decision of the Court of Appeal in *In re Mathieson* (1), it is only settlements of property of the debtor which are avoided by the section.

In my opinion, however, the transaction is not capable of being dissected in the way suggested. The short answer to the argument is that the debtor never, in form or substance, became entitled in respect of the sums in question to anything except the right to require payment of those sums to third parties. That right, with all its consequences, remained vested in him, and is now vested in his trustee in bankruptcy. No settlement was, therefore, made of property as defined in the Act in which the debtor ever had any interest. The so-called dissection results in an entirely different transaction from that which was entered on, and acceptance of it would attribute to both parties intentions which are not expressed in the contract and which are not suggested by any relevant circumstances, however wide the net of relevancy be cast. The result is that the motion fails. I will make a declaration that, on the true construction of the agreement, payment to the widow and daughter according to the terms of the agreement is due performance of the agreement, notwithstanding that the trustee requires payment to be made to him. The widow and daughter are entitled to any sum so paid to their own use.

Solicitors: *Tarry, Sherlock & King; Morris, Ward-Jones, Kennett & Co.; Albert M. Oppenheimer.*

K. R. A. H.

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(1) [1927] 1 Ch. 283.

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Administration—Intestacy—Policy of assurance—Payment of monthly sum for period of years—Capital or income—Conversion and investment as capital—Subsequent capital payment—"Reversionary "interest"—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33, *sub-ss.* 1, 4.

By a policy of life assurance, the insurers undertook to pay 500*l.* with profits on the death of the assured or his attaining the age of sixty, and, if the assured should die within twenty years of the date of the policy, to pay 50*l.* on death, 52*l.* a year by monthly instalments for the remainder of the twenty years, and 450*l.* at the expiration of the period. The assured died intestate three years and nine months after the date of the policy, without issue but leaving a widow surviving and next of kin:—

Held, that the monthly instalments paid and to become payable under the policy were capital and not income of the residuary estate, within s. 33, sub-s. 4, of the Administration of Estates Act, 1925, and must be converted and invested as a wasting security under the rule in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137; and that past payments of the instalments ought to be apportioned as between capital and income on the principle of *In re Earl of Chesterfield's Trusts* (1883) 24 Ch. D. 643.

The rule in *Howe* v. *Lord Dartmouth* does not apply where there is a trust for conversion and a power to postpone conversion duly exercised, but s. 33, sub-s. 1, of the Administration of Estates Act, 1925, which imposes on an intestate's estate a statutory trust for conversion and a power to postpone does not abolish the rule in cases of intestacy, and it will still apply where there has been no exercise of the power to postpone conversion.

Moneys secured by a policy of life insurance and payable by instalments or by a lump sum in the future are not a "reversionary "interest," excluded from the trust for conversion by s. 33, sub-s. 1, of the Act.

ADJOURNED SUMMONS.

On April 12, 1938, the intestate, Frederick Stanley Fisher, who died intestate on December 14, 1941, effected a policy on his own life, issued by Boots Co-operative Insurance and Pension Society, Ld., insuring 500*l.* with profits payable at death after the first twenty years or at the age of sixty, at an annual premium of 21*l.* 4*s.* 1*d.*, payable on March 11 in each year. The policy contained a clause in the following terms: "In "the event of death occurring within twenty years, income of "52*l.* per annum is payable for the remainder of the twenty "years, 50*l.* immediately on death, and 450*l.* when the income "ceases." The intestate was married, and he left his widow,

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Madeline Jane Fisher, surviving, but no children. His next of kin were four daughters of his father by a previous marriage of which there had been issue six children, two being sons who had predeceased the intestate without leaving issue. On November 27, 1942, letters of administration were granted to the widow and to the plaintiffs, two of the intestate's half-sisters. The net value of the estate was between 2400*l.* and 2500*l.* On the death of the intestate the society paid to his representatives 70*l.*, of which 50*l.* was the sum named in the policy, and 20*l.* profits calculated down to the date of death. In addition, the society paid and were paying to the representatives the sum described in the policy as " income " of 52*l.* a year by monthly instalments of 4*l.* 6*s.* 8*d.*, which under the policy was payable until March 11, 1958. The policy was valued for estate duty at 1038*l.* 18*s.* 6*d.*, composed as follows : (1.) the 70*l.* paid on death, (2.) 684*l.* 12*s.* 6*d.*, the then present value of the annual income of 52*l.*, and (3.) 282*l.* 6*s.*, the then present value of 450*l.* payable on March 11, 1958. The summons was taken out by the plaintiffs to determine the questions whether in the administration of the estate the monthly sums of 4*l.* 6*s.* 8*d.* payable under the policy ought to be treated as capital or income, or as partly capital and partly income, and, if partly one and partly the other, how the sums ought to be apportioned as between capital and income. The widow and the other two half-sisters as next of kin were made defendants.

Fawell for the plaintiffs.

Wilfrid Hunt for the widow. The instalments of 4*l.* 6*s.* 8*d.* a month payable under the policy are income of the residuary estate, payable to the widow. It is no doubt a larger income than the capital value of the policy moneys could normally produce, but the whole object of the policy was to provide such an income during the first twenty years in case the assured died young leaving a widow with young children who would need maintenance and education. The instalments are income of part of the personal estate within s. 33, sub-s. 5, of the Administration of Estates Act, 1925 (1). The payment

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(1) By s. 33 of the Administration of Estates Act, 1925 : " (1.) On "the death of a person intestate as "to any real or personal estate, "such estate shall be held by "his personal representatives— "(*a*) as to the real estate upon "trust to sell the same ; and (*b*) "as to the personal estate upon "trust to call in sell and convert

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of the capital sum of 450*l.* was postponed by the policy to allow of this payment in the meantime. On the construction of the policy, it is not merely a right to receive income, but is actual income. Any part of the residuary estate which is retained unsold is property to the income of which the widow

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"into money such part thereof as "may not consist of money, with "power to postpone such sale and "conversion for such a period as "the personal representatives, "without being liable to account, "may think proper, and so that "any reversionary interest be not "sold until it falls into possession, "unless the personal representatives see special reason for sale, "and so also that, unless required "for purposes of administration "owing to want of other assets, "personal chattels be not sold "except for special reason. (2.) "Out of the net money to arise "from the sale and conversion "of such real and personal estate "(after payment of costs), and "out of the ready money of the "deceased (so far as not disposed "of by his will, if any), the "personal representative shall pay "all such funeral, testamentary "and administration expenses, "debts and other liabilities as "are properly payable thereout "having regard to the rules of "administration contained in this "Part of this Act, and out of the "residue of the said money the "personal representative shall set "aside a fund sufficient to provide "for any pecuniary legacies bequeathed by the will (if any) "of the deceased. (3.) During the "minority of any beneficiary or "the subsistence of any life "interest and pending the distribution of the whole or any "part of the estate of the deceased, the personal representatives may invest the residue "of the said money, or so much "thereof as may not have been "distributed, in any investments "for the time being authorised "by statute for the investment of "trust money, with power, at "the discretion of the personal "representatives, to change such "investments for others of a like "nature. (4.) The residue of "the said money and any investments for the time being representing the same, including (but "without prejudice to the trust for "sale) any part of the estate of the "deceased which may be retained "unsold and is not required for "the administration purposes "aforesaid, is in this Act referred "to as 'the residuary estate of "'the intestate.' (5.) The income "(including net rents and profits "of real estate and chattels real "after payments of rates, taxes, "rent, costs of insurance, repairs "and other outgoings properly "attributable to income) of so "much of the real and personal "estate of the deceased as may "not be disposed of by his will, "if any, or may not be required "for the administration purposes "aforesaid, may, however such "estate is invested, as from the "death of the deceased, be treated "and applied as income, and for "that purpose any necessary "apportionment may be made "between tenant for life and "remainderman. (6.) Nothing in "this section affects the rights of "any creditor of the deceased "or the rights of the Crown in "respect of death duties. (7.) "Where the deceased leaves a will, "this section has effect subject

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is entitled: *In re Thomas* (1), a decision followed in *In re Godfree* (2). Both sub-ss. 4 and 5 of s. 33 have the effect of excluding the rule in *Howe* v. *Lord Dartmouth* (3): see *In re Sullivan* (4), per Maugham J., and any words which exclude that rule also exclude the rule in *In re Earl of Chesterfield's Trusts* (5). The money is a reversionary interest, excepted from the trust for sale. The Administration of Estates Act, 1925, in effect provides a statutory will for an intestate, and under that will the actual income of the residuary estate goes to the tenant for life. These sums, therefore, are income, and should be treated as income. They will be treated as income by the revenue authorities, and the appropriate tax will be deducted.

Winterbotham for the defendants, the next of kin. When money is payable by monthly instalments under an insurance policy such as the present, each instalment is capital and not income. The payments are not the fruit of any property, but the property itself: see Gover on Capital and Income, 3rd ed., at p. 177. This is a terminable annuity, a form of wasting property to which the rule in *Howe* v. *Lord Dartmouth* (3) applies: *Crawley* v. *Crawley* (6). It is the duty of the administrators to realize this monthly sum for cash and to invest the proceeds to the income of which the widow is

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"to the provisions contained in "the will."

By s. 46: "(1.) The residuary "estate of an intestate shall be "distributed in the manner or be "held on the trusts mentioned in "this section, namely:—(i.) If "the intestate leaves a husband "or wife (with or without issue) "the surviving husband or wife "shall take the personal chattels "absolutely, and in addition the "residuary estate of the intestate "(other than the personal "chattels) shall stand charged "with the payment of a net sum "of one thousand pounds, free "of death duties and costs, to the "surviving husband or wife with "interest thereon from the date of "the death at the rate of five "pounds per cent. per annum "until paid or appropriated, and, "subject to providing for that "sum and the interest thereon, the "residuary estate (other than the "personal chattels) shall be held— "(*a*) If the intestate leaves no "issue, upon trust for the sur"viving husband or wife during "his or her life; . . . . (v.) If the "intestate leaves no issue or "parent, then, subject to the "interests of a surviving husband "or wife, the residuary estate of "the intestate shall be held in "trust for the following persons "living at the death of the "intestate, and in the following order and manner, namely:— ". . . . Secondly, on the statutory "trusts for the brothers and "sisters of the half blood of the "intestate."

(1) [1891] 3 Ch. 482.

(2) [1914] 2 Ch. 110.

(3) (1802) 7 Ves. 137.

(4) [1930] 1 Ch. 84.

(5) (1883) 24 Ch. D. 643.

(6) (1835) 7 Sim. 427.

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entitled: *In re Whitehead* (1); *In re Pope* (2); *In re O'Hagan* (3). The monthly payments are not a reversionary interest. Where under the will of a testator unauthorized investments are retained unconverted, as they have been here, the rule in *Howe* v. *Lord Dartmouth* (4) still remains applicable under s. 33 of the Administration of Estates Act. [*In re Trollope's Will Trusts* (5); *In re Sullivan* (6) were also referred to.]

Hunt replied.

Cur. adv. vult.

July 20. BENNETT J. read a judgment in which he stated the facts, and continued: The answer to the questions raised depends on the proper interpretation and application to the facts of s. 33 and s. 46, sub-s. 1, of the Administration of Estates Act, 1925. [His Lordship read these sections, and continued:] The residuary estate to which the provisions of s. 46 are to be applied is the residuary estate as defined by sub-s. 4 of s. 33, that is to say, the net moneys arising from the sale and conversion of the real and personal estate of the intestate and his ready money after payment of his funeral and testamentary expenses and debts and any pecuniary legacies and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which the legal personal representatives have retained unsold, and the provision in s. 46, sub-s. 1 (i.) (*a*), that the residuary estate is to be held upon trust (if the intestate leaves no issue) for the surviving wife during her life means that the surviving wife is entitled to be paid during her life the actual income produced by the residuary estate as so defined, so that, if the legal personal representatives of an intestate, exercising their discretion in that behalf, have postponed the sale and conversion of an unauthorized or wasting security belonging to the intestate and that security produces income, a surviving wife is entitled to be paid that income: see *In re Thomas* (7). I do not myself find any great difficulty in applying the provisions of s. 33 of the Act to the facts of the case, or in deciding what are the duties of the intestate's legal personal representatives in regard to the moneys payable under the policy, and what are the rights of the intestate's widow in those moneys, but there are two questions which have given rise to discussion.

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(1) [1894] 1 Ch. 678.
(2) [1901] 1 Ch. 64.
(3) [1932] W. N. 188.
(4) 7 Ves. 137.
(5) [1927] 1 Ch. 596.
(6) [1930] 1 Ch. 84.
(7) [1891] 3 Ch. 482.

The first is, whether the annual sums of 52*l.* described in the policy as income are income arising since the intestate's death from his estate, and whether they differ in any way from the sum of 450*l.* which is due for payment on March 11, 1958. The second question is whether the annual payments and the sum of 450*l.* are reversionary interests within the meaning of those words in sub-s. 1 of s. 33.

Mr. Hunt, on behalf of the intestate's widow, argued that the annual sums were income arising since the intestate's death from his estate. He argued that they differed in some way from the 450*l.* which he said was capital and was a reversionary interest of the intestate excepted from the trust for sale. In my judgment, this argument is unsound. The foundation of it was the fact that the annual sums are described in the policy as income, but words cannot alter things. An oak tree remains an oak tree, although parties as a matter of convention between themselves agree to call it an acorn. Save in respect of amount and dates of payment, no distinction is, in my judgment, to be drawn between the annual sums payable under the policy and the sum of 450*l.* All the sums become payable after the intestate's death. All of them are payable under the same contract. All of them come from the same source. It is not possible to point to any property of which the intestate was possessed when he died and to predicate of the annual sums that they are income arising from that property since the intestate's death. There was not, and is not, any tree belonging to the intestate of which the annual payments are the fruits. Mr. Hunt suggested that the annual sums might be regarded as income of the sum of 450*l.*, but this suggestion is pure fancy, the creation of a fertile brain. It has no foundation in fact. There is no sum of 450*l.* invested and producing an annual income of 52*l.* In my judgment, when the intestate died, the annual sums and the 450*l.* were all part of the capital of the intestate's personal estate. They were all debts due at different dates after his death and payable to his legal personal representatives as a result of a contract which he had made.

The second question is one of construction of s. 33, sub-s. 1, of the Act, and is whether these future payments are reversionary interests and so excepted from the trust for sale. In my judgment, they are not. The words, in my judgment, mean a future interest vested in the intestate at the moment of his death in some specific property which at that moment is in the possession or enjoyment of some other person. They do not mean or include a mere promise made to a man to pay his legal personal representatives a sum or sums of money at a specified time or times after his death. The language of the section points, in my judgment, quite clearly, to specific property which at the intestate's death is in the possession of another, which property will, on the happening of an event after the intestate's death, come into the possession of his legal personal representatives. A debt payable in the future is not, in my judgment, such property. It is not possible now to point to any property in the possession of Boots' Co-operative Insurance and Pension Society, Ld., and to say of it that that property will at some future time come into the possession of the intestate's legal personal representatives.

On the two questions which I have indicated I come to the conclusion, first, that the annual payments are not income of the intestate's estate; that, save in respect of the amount and dates of payment, they are indistinguishable from the sum of 450*l.*; and that the annual payments and the 450*l.* were parts of the intestate's estate at his death; and, secondly, that neither the annual payments nor the sum of 450*l.* are reversionary interests within the meaning of s. 33, sub-s. 1. On these conclusions the duty of the intestate's legal personal representatives is clear. When the intestate died their trust was to convert all the future payments under the policy into cash. They had a power to postpone conversion, but it is quite clear on the evidence that they have not hitherto exercised that power.

Before answering the questions asked by the summons, there was an argument advanced by Mr. Hunt on behalf of the widow with which I must deal. On the footing that the annual payments were income, Mr. Hunt claimed that his client was entitled to receive all of them which were made during her life, and this argument was based on the proposition that the rule in *Howe* v. *Lord Dartmouth* (1) did not apply in the case of an intestacy occurring since 1925, with the consequence that the duty of the legal personal representatives was not to realize the present value of the 450*l.*, but to leave it outstanding until 1958. If the widow was alive then, the

(1) 7 Ves. 137.

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whole sum would be invested, and his client would receive the income of the investments. His argument was that, as the rule in *Howe* v. *Lord Dartmouth* was excluded, there could be no apportionment between capital and income, on the principle of *In re Earl of Chesterfield's Trusts* (1), of the sum of 450*l.* when that sum is paid to the legal personal representatives in 1958. It is necessary to consider the argument, because I have to decide what adjustments, if any, have now to be made between tenant for life and remaindermen in regard to the annual payments which have been made since the intestate's death and in regard to the future payments which have to be made and which ought to have been converted into cash at the intestate's death.

Mr. Hunt's argument was rested on the observations of Maugham J. in *In re Sullivan* (2). In that case the testator, a nephew of the late Sir Arthur Sullivan, the well-known musical composer, was entitled to Sir Arthur's musical copyrights. Being so entitled, the testator made a will whereby he appointed executors and trustees, and after certain legacies and gifts, disposed of his real and the residue of his personal estate to his trustees upon these trusts: "Upon trust so long "as any royalties shall be payable to me to receive and invest "the same in any securities hereinafter authorised, it being "my wish that my royalties shall be treated as capital "moneys." The testator then made provision for the investment of the residue of the moneys which, with the royalties payable to him, he called his trust fund, and for payment of the income of the trust fund to his wife during her life. Subject to the life interest of his wife, the ultimate trusts of his trust fund were in favour of his children and remoter issue. The testator died in November, 1928, leaving a widow and brothers and sisters and without having had any children, and so intestate save in regard to the legacies and the life interest to his widow. The trustees of the will issued an originating summons asking the question whether the testator's widow, if she executed a disclaimer of her life interest under the will, would be entitled under the intestacy and under the Administration of Estates Act, 1925, to a life interest in the testator's residuary estate, and whether in that event royalties received by the trustees in respect of copyright or other interests in the estate would be income or capital, or how otherwise such royalties would be applicable. The point of the case, of course, was whether the disclaimer of the life interest would get rid of the duty imposed on the trustees by the will to invest the royalties. After summarizing the facts, Maugham J. is reported as follows (1): "Royalties are prima facie in the nature of "wasting property, to which the rule in *Howe* v. *Lord Dart*"*mouth* (2) applies. Where there is a complete intestacy the "provisions of s. 33, sub-s. 5, of the Administration of Estates "Act, 1925, will apply, with the result, in the present case, "that the widow, having (if she disclaims) the interest of a "tenant for life, will be entitled, assuming that cls. 6 and 7 of "the will become inoperative, to the whole of the royalties, "as that sub-section excludes the rule in *Howe* v. *Earl of* "*Dartmouth* (2). The only question is whether the disclaimer "will render inoperative for all purposes that part of the will "which it affects." As I have said, the point of the summons was to get a decision on the question whether, if the widow disclaimed her life interest, the trust to invest the royalties, the income of copyrights owned by the testator would come to an end, and whether in that event the royalties would be income of the testator's residuary estate. Both these questions were answered in the affirmative. The learned judge was not asked to decide, and did not decide, whether the copyrights which produced the royalties were freed from the trust for conversion contained in s. 33, sub-s. 1. Mr. Hunt's argument, if I followed it correctly, was that I was to regard Maugham J.'s observations as having been made after a consideration of all the provisions to be found in s. 33, and as an exposition of the meaning and effect of all the provisions to be found in the section after such consideration. I feel sure, after a study of the report, including the report of the arguments, that this is not the case, and I feel equally sure, in view of the unambiguous language of s. 33, sub-s. 1 (*b*), of the Act that the learned judge could not have decided that all the income of a wasting security such as a copyright was receivable by the tenant for life unless there had been an exercise of the power to postpone conversion. Of course, if that power has been exercised, the whole of the income of a wasting security is receivable by a tenant for life.

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(1) 24 Ch. D. 643.

(2) [1930] 1 Ch. 84.

In the case of a residuary bequest of personalty to trustees on trust for conversion with a power to postpone and a trust to pay the income of the subject of a bequest to a person for life with a gift over, the rule of administration formulated by

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(1) [1930] 1 Ch. 87.

(2) 7 Ves. 137.

Lord Eldon in *Howe* v. *Lord Dartmouth* never arises. It only arises in cases where there is a residuary bequest to persons in succession and no trust for conversion: see per Lord Cranworth L.C. in *Bate* v. *Hooper* (1). In *Howe* v. *Lord Dartmouth* (2) Lord Eldon was considering the bequest in the will of William, Earl of Strafford, the bequest being "to his wife "Anna Countess of Strafford all his personal estate whatsoever "for her life." It was when deciding how a court of equity would administer this bequest that Lord Eldon formulated his famous rule. He said: "It"—that is the personal estate—"is given as all his personal estate; and the mode, in which "he says it is to be enjoyed, is to one for life, and to the others "afterwards. Then the court says, it is to be construed as "to the perishable part, so that one shall take for life, and the "others afterwards; and unless the testator directs the mode "so that it is to continue as it was, the court understands, "that it shall be put in such a state, that the others may enjoy "it after the decease of the first; and the thing is quite equal; "for it might consist of a vast number of particulars; for "instance a personal annuity, not to commence in enjoyment "till the expiration of twenty years from the death of the "testator, payable upon a contingency perhaps. If in this "case it is equitable, that long or short annuities should be "sold, to give everyone an equal chance, the court acts equally "in the other case; for those future interests are for the sake "of the tenant for life to be converted into a present interest; "being sold immediately, in order to yield an immediate "interest to the tenant for life. As in the one case that, in "which the tenant for life has too great an interest, is melted "for the benefit of the rest, in the other that, of which, if it "remained in specie, he might never receive any thing, is "brought in; and he has immediately the interest of its "present worth." It is to be noted that the rule Lord Eldon formulated has two branches, the one designed to ensure that the remainderman shall enjoy the interest in the residuary estate which the testator is presumed to have intended him to enjoy and requiring, therefore, the sale of wasting or hazardous investments and the investment of the proceeds in permanent securities, and the other designed to ensure that the tenant for life shall enjoy the interest in the residuary estate which the testator is presumed to have intended, and, therefore, requiring the present value of future interests to be

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(1) (1855) 5 De G. M. & G. 338.

(2) 7 Ves. 137, 148.

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obtained and invested. The rule cannot apply to a case where the trust is one to convert with a power to postpone. In such a case the terms of the trust have to be observed, and *Howe* v. *Lord Dartmouth* (1) and *In re Earl of Chesterfield's Trusts* (2) only become relevant when the terms of the trust have not been complied with and there has to be an adjustment of the rights of the tenant for life and remainderman. In such a case the adjustment is made in accordance with the way in which in those two cases the rights of the parties were adjusted.

It now remains to apply the provisions of s. 33 of the Administration of Estates Act, 1925, having regard to my decision. None of the payments under the policy falling due after the intestate's death are income. No distinction is to be drawn between the payments described as income and the sum of 450*l.* All of these sums should have been converted into cash and invested as soon as possible after the intestate's death, and the income of the investments should have been paid to the intestate's widow. In fact, nothing has been sold and the power to postpone conversion has not been exercised. As regards payments made in the past, in respect of each of them a calculation should be made in accordance with the principle laid down in *In re Earl of Chesterfield's Trusts* and each sum apportioned between capital and income in accordance with that decision, but the sums are so small, and the intestate has been dead for so short a time that it may be that the widow will be content to have all the past payments treated as capital and invested. As regards the future payments, these should be realized at once and invested.

Solicitors: *Kingsford, Dorman & Co., for Kingsford Flower & Pain, Ashford, Kent.*

H. L. L.

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(1) 7 Ves. 137.

(2) 24 Ch. D. 643.

Pugh, In re - - - [1943] 1 Ch. 387
Distinguished. *In re* FRANKS, FRANKS *v.* FRANKS [1948] 1 Ch. 62

EASED).

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Family provision—Widow—Sole "dependant"—Residue to widow absolutely—Income of residue less than half income of whole estate—Power of court to order provision—"Testator's reasons . . . . for ". . . . not making . . . . further provision" for widow—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-s.* 3 (*b*), *sub-s.* 7.

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A testator devised a farm to his grandson and his residue to his wife absolutely. The value of the farm was 5000*l.* net, and that of the residue was 1800*l.* net, and, therefore, taking three-and-a-half per cent. as the appropriate rate of income, the "annual "income" of the net estate, within s. 5, sub-s. 1, of the Inheritance (Family Provision) Act, 1938, was 238*l.* The widow, who was the only "dependant" of the testator within s. 1, sub-s. 1, of the Act, asked that further provision might be made for her maintenance out of the income of the estate so that her total income would be increased, under s. 1, sub-s. 3 (*b*), to one-half the annual income, that was to say, from 63*l.* (three-and-a-half per cent. on 1800*l.*) to 119*l.* On behalf of the grandson it was contended that the widow, having been left 1800*l.* capital, could buy with it an annuity of 99*l.*, and, therefore, that the court could not give her more than a further 20*l.* a year. There was evidence that, about four months before his death, the testator told his solicitors that he was going to alter his will, and that he told the widow that he intended leaving everything to her, spoke to her often on the subject during the following weeks, and, just before becoming unconscious at the time of his death, again said that he intended leaving all to her:—

Held, (1.) that, in calculating the fraction of the annual income of the net estate of a testator to which a "dependant" is entitled under his will, as varied by an order or orders under the Act, the court will disregard the fact that the testator has given to the dependant any part of the capital from which the income arises, and that, therefore, the court could give the widow a further 63*l.* a year, bringing her total income to 119*l.*, but, on the facts, that the testator had not acted unreasonably in not making further provision for her; (2.) that the statements by the testator of his intentions did not show that his "reason," within s. 1, sub-s. 7, of the Act, for not making further provision for the widow was that he had died before he could do so.

ADJOURNED SUMMONS.

A testator, by his will, dated August 23, 1939, appointed his wife sole executrix, devised a farm to his grandson, and devised and bequeathed his residue to his wife absolutely. He died on October 11, 1941, and his widow was his only "dependant" within s. 1, sub-s. 1, of the Inheritance (Family Provision) Act, 1938. She was his third wife, and, after having been his housekeeper for some time, had married him on March 13, 1939, when he was 75 years old and she was a widow aged 47, with a grown-up son. The testator had been a prosperous farmer, but, while there was evidence that one of his sons, the father of the grandson, had contributed to the prosperity of the farm, there was no evidence that the widow had done so. The testator's net estate, other than the farm, was of the value of about 1800*l.*, and the value of the farm was

5000*l.* At the date of this summons it was let for 170*l.* a year, and the net income from it was between 151*l.* and 161*l.* a year. There was evidence on the summons that, on June 30, 1941, the testator called on his solicitors and asked them for his will, saying that he was going to alter it and wished to take it home and consider it; that, about a week later, he told his wife that he intended leaving everything to her; and that, as he was passing into unconsciousness just before his death, he told her that he intended leaving all to her. Apart from the residue of 1800*l.*, a sum of 140*l.* and personal belongings to the value of 21*l.*, the widow had no means. She was in poor health, but intended to seek work as soon as she could, and her son was not able to contribute to her maintenance. By this summons she asked that, pursuant to s. 1 of the Act, further provision might be made for her maintenance out of the income of the testator's estate. The defendant to the summons was the grandson to whom the farm had been devised.

Jopling for the widow. Under s. 1, sub-s. 3 (1), the court can make applicable for the maintenance of the widow up to one-half of the income of the whole estate. It is reasonable to assume that the rate of the income which the net estate might be expected at the date of the order, if realized, to yield in a year would be three-and-a-half per cent. That makes the income from the residue 63*l.* and from the farm, at its value of 5000*l.*, 175*l.* The total income is thus 238*l.*, and the widow

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(1) By Inheritance (Family Provision) Act, 1938, s. 1, sub-s. 3: "The amount of the annual "income which may be made "applicable for the maintenance "of a testator's dependants by an "order or orders to be in force at "any one time shall in no case be "such as to render them entitled "under the testator's will as "varied by the order or orders to "more than the following fraction "of the annual income of his net "estate, that is to say: . . . . "(*b*) if the testator . . . . leaves "a wife . . . . and no other "dependant, one-half."

By sub-s. 7: "The court "shall also, on any such applica-"tion, have regard to the testator's "reasons, so far as ascertainable, "for . . . . not making . . . . any "further provision . . . . for a "dependant, and the court may "accept such evidence of those "reasons as it considers sufficient, "including any statement in "writing signed by the testator "and dated, so, however, that in "estimating the weight, if any, to "be attached to any such state-"ment the court shall have regard "to all the circumstances from "which any inference can reason-"ably be drawn as to the accuracy "or otherwise of the statement."

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is, therefore, entitled to 119*l.* The amount that the court actually can make applicable for her maintenance is thus 56*l.* True, in considering the application, the court must have regard to s. 1, sub-s. 6, but there is nothing in that sub-section which affects its power to give her the 56*l.*

F. C. Watmough for the grandson. The argument for the widow is on an incorrect basis. The court, in having regard to s. 1, sub-s. 3, cannot make half the income of the net estate applicable for her maintenance. The court must determine what amount of income it can make applicable for the maintenance of dependants under s. 1, sub-s. 3, by reference to the greatest income which the capital from which the income arises would yield: *In re Catmull* (1). Here, the 1800*l.* could produce an income of 99*l.* for the widow if she bought a government annuity with it, and it is that fact, and not the fact that three-and-a-half per cent. on 1800*l.* is 63*l.*, that must be taken into consideration. Thus, if she were given another 56*l.* a year, she would be getting, not 63*l.* plus 56*l.*, but a potential 99*l.* plus 56*l.*, which would be more than half the annual income of the estate. The court should not give her more than 20*l.*, which will bring her potential 99*l.* up to 119*l.* To give her more would be against the principle of *In re Catmull* (1), where Uthwatt J. decided that, in exercising the jurisdiction under s. 1, sub-s. 4, of the Act and ascertaining the amount of the capital payment to be made, the court would ascertain the amount of the income. Where, as here, the opposite has to be done and the court has to determine, under sub-s. 3, the amount of the annual income which is applicable, it will take into account any capital which has been left to the dependant by the settlor and the highest income which that capital can be made to produce.

Jopling replied.

Cur. adv. vult.

July 21. MORTON J. It is contended by Mr. Jopling for the widow that I have power under the Act to direct that 56*l.* per annum be paid to her during her widowhood by way of additional allowance for maintenance. He arrives at this figure by the following reasoning. Under the will she gets 63*l.* per annum out of the annual income of the net estate as defined by the Act, that is, 63/238ths of the annual income. Mr. Jopling submits that the court, therefore, has power to give her an additional income of 56*l.* per annum so that she will receive, by the joint effect of the will and the order of the court, 119/238ths, or one-half of the annual income. The fact that she is given by the will the capital from which this income of 63*l.* is derived is, said Mr. Jopling, material to be taken into account under s. 1, sub-s. 6, but it does not deprive the court of jurisdiction to order the payment to the widow of a further 56*l.* per annum under s. 1, sub-s. 3. He suggests that 52*l.* per annum would be a reasonable provision. Mr. Watmough, for the infant defendant, contends that I have no power to award the widow more than 20*l.* a year, on the figures already stated. He arrives at this conclusion as follows. The sum of 1800*l.* to which she is absolutely entitled under the will, if invested in a government annuity for her life, would produce approximately 99*l.* a year. For the purposes of s. 1, sub-s. 3, says Mr. Watmough, you must reduce the capital given to the widow by the will to terms of income, actual or potential, and, if the court gives her a further 56*l.*, she will be receiving in each year the equivalent of 99*l.* plus 56*l.*, or 155*l.*, which is 36*l.* more than one-half of the annual income of the net estate. In my judgment, by this argument, Mr. Watmough is asking me to depart from the natural meaning of the words of s. 1, sub-s. 3. The court has, first, to ask itself : To what fraction of the annual income of the net estate, as defined by the Act, is the widow entitled under the will ? The true answer is, in my view, that she is entitled to 63/238ths, the infant being entitled to the remaining 175/238ths. True, she can secure for herself a higher rate of income by buying a government annuity, but, for the purposes of the sub-section, this is quite irrelevant. The court has to regard only the annual income of the testator's net estate, ascertained in accordance with the Act. That income, so ascertained, is 238*l.* Of that income, so ascertained, the widow is entitled under the will to 63*l.* and no more. If she were to buy a government annuity, she would become entitled, under the terms of her bargain with the government, to 99*l.* a year, but the difference of 36*l.* does not represent a portion of the annual income of the net estate (ascertained in accordance with the Act) to which the widow is entitled under the will. Thus, the court has power to give her a further 56*l.* to make up her fraction of the annual income of the net estate to one-half.

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(1) Ante p. 262.

I may add that Mr. Watmough's contention would lead to certain remarkable results if it were correct. For instance,

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in the present case, I could give the widow no more than 20*l.* a year out of the infant's 175*l.* a year, with the result that, whether she bought an annuity or not, the widow would be getting less income than the infant, yet, according to Mr. Watmough, she would be receiving half the annual income of the net estate. Again, I think that the words "the income "of the net estate" in the proviso to s. 1, sub-s. 1, must mean the same as the words "the annual income of his net estate" in sub-s. 3, yet, if Mr. Watmough is right, in a case in which the testator had bequeathed capital to his widow it would be necessary to consider what annuity the widow could buy, having regard to her age, in order to see whether an application could be made to the court on behalf of the testator's infant children. I cannot believe that the legislature had any such intention.

For these reasons I am satisfied that my jurisdiction is not limited in the manner suggested by Mr. Watmough, though I fully recognize that the possession by the widow of this sum of capital is a matter to which I ought to have regard under s. 1, sub-s. 6. In my judgment, in calculating the fraction of the annual income of a testator's net estate to which a dependant is entitled under the testator's will, within the meaning of sub-s. 3, the court should disregard the fact, if it be the fact, that the testator has given to that dependant by his will not only income but also the capital from which that income arises.

I reserved judgment on this point because Mr. Watmough suggested that a decision against him would be in conflict with the principle of the decision of Uthwatt J. in *In re Catmull* (1). In that case the estate was under 2000*l.*, and Uthwatt J. had to consider what provision the court could make for the widow out of capital under s. 1, sub-s. 4. The learned judge said (2): "The principle of the maximum stated "in sub-s. 3 embraces the purpose, the creation of interests "not exceeding life interests, for which the maximum is to be "used. If this be so, one does not give effect to the principle "of sub-s. 3 by applying the fractions two-thirds or one-half "to the capital of the estate. In my view, the point of sub-s. 4 "is not to increase the total amount which might be made "applicable for dependants by an order, but only to enable "capital instead of income to be made so applicable. It is "only an altered method of payment that is provided. This

(1) Ante p. 262.

(2) Ibid. 267.

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"view of the section does not involve any practical difficulties. "The court, in exercising the power given by sub-s. 4, can "determine the amount of income which would, on an exercise "of the jurisdiction under sub-s. 2, be allotted to the claiming "dependant and the period for which payment of that income "should continue and capitalize the sum." Mr. Watmough argues that if, for the purposes of sub-s. 4, income has to be expressed in terms of capital, then, for the purposes of sub-s. 3, any capital given by the will to a dependant should be expressed in terms of income actual or potential. This seems to me to be a non sequitur, but Mr. Watmough suggests that, if I do not give effect to his argument, my decision will in some way be at variance with the views expressed by Uthwatt J. I do not agree with this suggestion, and to test it I shall assume that, in the present case, the total of the net estate is 680*l.* instead of 6800*l.*, and that the testator has given to his widow 180*l.* instead of 1800*l.* In that event the annual income of the net estate would have been 23*l.* 16*s.*, of which the widow would have taken under the will 6*l.* 6*s.* By the joint effect of my present decision and the decision in *In re Catmull* (1), the court could either give the widow a further 5*l.* 12*s.* income, thus making up her income to half the income of the net estate, or could give her (adopting the language of Uthwatt J.) a capital sum assessed by reference to the widow's age and the sum of 5*l.* 12*s.* These two decisions work quite harmoniously together, and I can see nothing in my decision, or in my reasoning, which is in any way at variance with the reasoning or the decision of Uthwatt J. in *In re Catmull* (1).

I now invite counsel to address me on the question of the order, if any, which I ought to make in favour of the widow on the facts.

Jopling for the widow. Had the testator not died, he would have fulfilled his intention of leaving everything to his wife. Only his death prevented him from doing so. The court should, therefore, treat the evidence of his statements as evidence of his "reasons" within s. 1, sub-s. 7, for "not "making any . . . . further provision" for his wife. The "reason" is that he died before he could do it, and, on the evidence, the court should make applicable for her maintenance the amount for which she asks.

Watmough for the grandson. What the testator did with his will is admissible in evidence. What he said to his wife is not. None of this matter, however, whether admissible or not, can possibly be evidence of his "reasons" for not making any further provision for her. A "reason" for not doing so must be a reason why he did not wish to do so. His death may have been the cause, but it cannot possibly have been his "reason."

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(1) Ante p. 262.

MORTON J. Before I give my decision on the facts of this case, I must give judgment on a question of law which arose during the argument. There was tendered in evidence the following statement by the widow which she exhibits to an affidavit: "On June 30, 1941, the testator called on his "solicitors and asked them for his will saying that he was going "to alter it and wished to take it home and consider it. About "a week after this he told the plaintiff that he intended leaving "everything to her. He mentioned this to the plaintiff "frequently during the ensuing weeks. Finally, as he was "passing into unconsciousness just before his death, he told "the plaintiff that he intended to leave all to the plaintiff." It is submitted that the whole of that paragraph, other than the first sentence, is inadmissible in evidence. It is to be observed that, apart from the first sentence, it consists entirely of statements by the testator as to his intentions, and, as it seems to me that such evidence may be frequently tendered in the future in this type of case, it is of some importance to see whether or not it comes within the wording of s. 1, sub-s. 7, of the Act. I am prepared to assume in favour of the widow, without so deciding, that oral statements alleged to have been made by the testator to the widow in his lifetime come within the terms of the sub-section, although the inclusion of the words "including any statement in writing signed by "the testator and dated" may possibly throw some doubt on that point. Making that assumption in favour of the widow, I am still of opinion that the evidence in question does not come within the terms of sub-s. 7. I cannot say that these statements of intention can fairly be described as the testator's reasons for not making any further provision for the dependant. It seems to me that they are statements of intention and nothing else. It was suggested by Mr. Jopling that they amounted in effect to a statement of his reasons, because it would appear that the only reason why the testator did not make further provision was that his death intervened before he had applied himself to the task. It may well be that the testator hesitated too long, but I cannot stretch the language of sub-s. 7 to include statements such as these.

If I had been sitting in the testator's armchair I should have made slightly more provision for the widow than the testator made, but I cannot conclude that the will did not make reasonable provision for the maintenance of the widow within the meaning of s. 1, sub-s. 1, of the Act. As I pointed out in *In re Styler* (1), quoting the judgment of Bennett J. in *In re Brownbridge* (2), the Act gives the court the right to interfere only if it concludes that the dispositions which were made were unwarranted, and I proceeded to say: "I do not think that a judge should "interfere with a testator's dispositions merely because he "thinks that he would have been inclined, if he had been in "the position of the testator, to make provision for some "particular person. I think that the court has to find that "it was unreasonable on the part of the testator to make no "provision for the person in question or that it was un-"reasonable not to make a larger provision." I cannot arrive at that conclusion in the present case. The widow was the testator's third wife. She was married to him for a brief time only. The testator had this farm, and he had about 1800*l.* of net personalty. The history of the farm is set out in the evidence, but no contribution to its prosperity, so far as one can see, was made by the widow, although contributions to its prosperity had been made by the father of the grandson who is now the defendant. Further, under sub-s. 6, I have to have regard to "any past, present or future capital or income "from any source of the dependant of the testator to whom "the application relates." I cannot disregard the fact that the testator had given to the widow the whole of the capital of his residuary estate. She has the capital sum of over 1800*l.*, which she can turn to account as she wishes. I doubt very much, if the testator had given the widow the maximum mentioned in the Act, that is to say, 119*l.* a year during her life or widowhood, whether she would have considered that a provision for which she would have been willing to exchange a capital sum of 1800*l.* I think that the testator did not act unreasonably in making no further provision for his widow, and I do not propose to make any order in her favour on this summons. I am not, however, inclined to saddle the widow

(1) [1942] Ch. 387, 388, 389. (2) (1942) 193 L. T. Jour. 185.

with the whole of the costs of the summons, and I propose, in all the circumstances of the case, to make no order as to costs.

Solicitors for widow: *Kinch & Richardson, for Davis, Lloyds & Wilson, Newport, Mon.*

Solicitors for grandson: *Lumley & Lumley, for J. C. Llewellin & Co., Newport, Mon.*

K. R. A. H.

MORTON J.
1943
July 26.

HANSELL *v.* SPINK.

Settlement—Lost settlement—Evidence—Secondary evidence of contents—Payment out of fund in court.

The funds in a marriage settlement made on October 18, 1873, comprised a policy of assurance for 500*l.* on the life of the husband. On June 9, 1880, the husband died. On December 8, 1880, the widow and the only child of the marriage (a son, who was then an infant) began an action for the execution of the trusts of the settlement, the trustees of the settlement being defendants. On March 5, 1881, the court ordered that the insurance company should have leave to pay the sum assured into court. On November 20, 1942, the widow died, and the son later took out this summons for payment out of the sum to him as the only child of the marriage. He could prove the pedigree events supporting his claim, but could not produce the settlement or a copy or draft of it. He gave evidence, however, of searches which had been made in the records and papers of the solicitors who had acted for the plaintiffs in 1880 and of their successors to 1943, and that many papers had been lost or destroyed. He also relied on the contents of the note made by the chief clerk in 1881 setting out a considerable part of the terms of the settlement which provided that the trust funds should be held for the widow for life and after the death of the survivor of her and her husband for the child or children of the marriage:—

Held, that, it being accepted that the terms of the settlement were in the form outlined in the chief clerk's note, and the fund having become distributable by reason of the death of the tenant for life, the son had established his title to the relief asked and was entitled to an order for payment out.

Perch v. *Robertson* (1943) 87 Sol. Jour. 66; 195 L. T. Jour. 72; and *In re Benjamin* [1902] 1 Ch. 723, considered.

CHAMBERS SUMMONS (1).

This was an application for payment out in an action begun by writ issued December 8, 1880, for execution of the trusts of a settlement dated October 18, 1873, made on the marriage of Alfred Hansell and Rose Elizabeth Procter, which was celebrated on October 20, 1873. The plaintiffs were the said Rose Elizabeth Hansell and William Procter Hansell (then an infant) who was the only child of the marriage. The defendants were the settlement trustees.

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(1) Reported by leave of the judge on a note prepared by Master Mosse and approved by his lordship.

The settlement funds comprised a policy for 500*l.* on the life of the husband (who died on June 9, 1880) in the Liverpool and London and Globe Insurance Co., and, on a summons issued by the plaintiffs an order was made on March 5, 1881, giving the company liberty to pay the sum assured into court by way of discharge of all further responsibility with regard to the policy money after making certain deductions therefrom authorized by the order. The net residue was to be lodged to the credit of the action "Account of policy money of Rose Elizabeth Hansell "widow for life remainder to infant plaintiff William Procter "Hansell defeasible as in the settlement mentioned with gift over "subject to duty on death of Rose Elizabeth Hansell." The widow, who subsequently re-married but had no issue of that marriage, died on November 20, 1942, whereupon the surviving plaintiff, William Procter Hansell, issued the present summons in the action for payment out of the fund in court to him as being the only child of the marriage. The fund was represented by a sum of 408*l.* 10*s.* 7*d.* two and a half per cent. consols and a sum in cash, being accumulations of interest. There was no difficulty in proving the relative pedigree events on which the applicant based his claim, but he was unable to produce the original settlement or any copy or draft. The settlement was in existence at the time of the order as the latter read an affidavit in which the settlement was earmarked specifically as being the exhibit thereto, but nowhere, either in the order or the evidence, was any mention made of the terms of the settlement, and it was not until the widow's death, more than sixty years after the date of the order opening the account, that occasion arose for ascertaining the trusts. The evidence before the court on this summons, on that aspect of the position, showed that searches had been made in the records and among the papers of the solicitors and London agents acting for the plaintiffs at the date of the writ and of their several successors in title down to the date of this summons, and that bundles of papers had from time to time been destroyed or got rid of over the intervening period of sixty years, sometimes on change of office, and, latterly, to assist in the paper salvage campaign during the war. As a last resort the applicant's solicitors asked to be allowed to refer to the note made in 1881, on the hearing of the summons by the chief clerk, in case any help might be forthcoming in that direction. This note was in the handwriting of the chief clerk, and read: "Settlement 18 Oct. 1873. Settles a policy in London "Liverpool & Globe for 500*l.* on marriage of Alfred Hansell "and Rose Elz. Procter to secure a payment of 50*l.* p.a. "The trusts of money are for Rose Elz. for life for sep. use, "remr. if she shall leave chn. surviving for Alfred Hansell for "life, after decease of survivor for children or chd. of mrre. "sons attg 21 daurs. attg 21 or marryg as tents in comn. If "no child attns vested interest then to survivor of Alfred "H. & Rose Elz. absly." There was no other evidence of the contents of the settlement.

[No counsel appeared in support of the application.]

MORTON J. The applicant bases his claim for payment out on the contention that the full note which the chief clerk made on the occasion in question can be relied on as being, in the proved circumstances of the case, sufficient secondary evidence of the material trusts of the lost settlement. There is no question as to the admissibility of secondary evidence, the substantial question being always as to the weight of such evidence when tendered. There is no doubt, here, that the original settlement was actually produced to the chief clerk, and that his note was made with the settlement before him. I am prepared to accept the terms of the settlement as being in the form outlined in the chief clerk's note.

Does that, however, necessarily entitle me to accede to the application? In this respect I am fortified by the decision of Uthwatt J. earlier in the year in *Perch* v. *Robertson* (1). That was a case where a settlement and all papers relating thereto had been destroyed by enemy action, the only known factor being the existence of a tenant for life to whom the dividends of the investments constituting the settlement funds had always been paid. There was, however, no certainty as to the trusts of the settlement beyond a recital of its contents contained in a will which the tenant for life had made ten years previously, the settlement on that occasion having been seen by the solicitors who prepared the will. The tenant for life issued a summons asking for a declaration that the investments were held upon the trusts set out in the summons which corresponded to those recited in the will. The learned judge declined to make an order in this form as it would have had the effect of binding all persons interested and so have prejudiced the interests of possible beneficiaries who were not before the court, but (being satisfied as to the facts) made an order that the trustees were to be at liberty, until further order, to hold the said investments on the footing that they were subject to the trusts set out in a schedule to the order, being the trusts specified in the summons as amended by the directions of the judge. This was really applying the well-known principle established by *In re Benjamin* (1), where the court, without making any positive order declaring rights, protects personal representatives or trustees by giving them liberty to distribute on a particular footing based on probable inferences.

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(1) (1943) 87 Sol. Jour. 66; 195 L. T. Jour. 72.

With a fund in court, there is no room for the application of the principle of permissive distribution. The court must take the responsibility of deciding whether to make or to refuse an order for payment out. Here, the court, the custodian of the fund, is asked to make an order for payment of the fund to the applicant out and out. That is going far beyond the principle in *In re Benjamin* (1), but the evidence in this case is stronger than that in *Perch* v. *Robertson* (2). The fund has become distributable by reason of the death of the tenant for life, and as I am satisfied that the applicant has established his title to the relief asked, I see no reason why, on principle or authority, he is not entitled to an order for payment out, which, accordingly, I make.

Solicitors for applicant: *Speechly, Mumford & Craig.*

(1) [1902] 1 Ch. 723. (2) 87 Sol. Jour. 66; 195 L. T. Jour. 72.

K. R. A. H.

Applied. *Re* Fison's Will Trusts. [1950] 1 All E.R. 501.

Followed. In re Fison's Will Trusts [1950] 1 Ch. 394

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July 14, 15, 29.

In re ARMSTRONG'S WILL TRUSTS.

GRAHAM *v.* ARMSTRONG AND OTHERS.

Settled land—Tenant for life—Option to son to purchase settled property after death of tenant for life—Sales by tenant for life of part of settled property—Right of son to exercise option over proceeds of sales—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 75, *sub-s.* 5.

A testator by his will made in 1899 gave to his wife a life interest in land and to his son an option, exercisable within twelve months after his wife's death, to buy the land for 5000*l.* In 1900 the testator died. His widow, as tenant for life, sold and otherwise dealt with parts of the land. She died in 1942, and over 19,000*l.* was due to be received in respect of her dealings with the land. Three days after her death the son purported to exercise his option:—

Held, that the son had validly exercised the option and was entitled to the moneys receivable in respect of his mother's sales of and other dealings with the land or to the investments representing them.

In re Flint [1927] 1 Ch. 570, distinguished.

ADJOURNED SUMMONS.

By cl. 7 of his will, dated December 12, 1899, a testator gave to his wife a life interest in land. By cl. 8 he directed his trustees to hold his residuary trust fund as therein mentioned. By cl. 12 he gave to his son an option, exercisable within twelve months after his wife's death, to buy the land for 5000*l.* On June 24, 1900, the testator died. The widow, in exercise of her powers as tenant for life, sold and otherwise dealt with parts of the settled land. On August 28, 1942, she died. On August 31, 1942, the son purported to exercise his option. The widow's dealings with the settled land had raised doubts whether it was exercisable and, if so, what it comprised. In respect of those dealings there was due to be received 19,431*l.* 12*s.* 8*d.* By this summons the plaintiff who, with the son, was a trustee of the will, asked whether the son was entitled to exercise the option and had validly done so, and whether he was entitled to those moneys or to the investments representing them.

Rawlence for the plaintiff.

Mulligan for the son. The son has validly exercised the option. The land is subject to a trust to allow the son to purchase the land for 5000*l.* if he exercises the option. The

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widow, as tenant for life, could sell notwithstanding the option, as she did, but the proceeds of sale are impressed with the trust and are to be held and treated exactly as if they were the settled land. Having exercised the option, the son is entitled to the property which remains unsold and to the proceeds of the sale, whether invested or not, of the parts that have been sold. [*In re Cant's Estate* (1), *In re Kerry* (2), *In re Wilson* (3), were referred to.]

Belsham for those interested in residue. The son could not validly exercise his option, and has not done so, because it was overridden by his mother's dealings with the settled land which were carried out in the exercise of her statutory powers: *In re Flint* (4). It must be assumed that the testator knew the provisions of the Settled Land Act, 1925, and that the widow, as tenant for life, could deal with the settled property, and that he intended that the son should take the risk of her doing so. *In re Kerry* (2) does not negative this contention, for there the option was exercisable at once, not, as in the present case, after an interval of time. In *In re Cant's Estate* (1), the option was exercisable against the trustees whenever they decided to sell. It was they who decided the moment of the transaction, but here it was the son who was to do so, provided that the widow had not prevented him by selling all or part of the property. He can exercise his option over the unsold parts, but not over the proceeds of sale of the rest. The overriding powers of a tenant for life can defeat an option which does not arise until after the death of the tenant for life. It is well settled that the statutory trusts are overriding trusts: *In re Thomas* (5): see also *In re Buchanan-Wollaston's Conveyance* (6). The words "transmission" and "devolution" in s. 75, sub-s. 5, of the Settled Land Act, 1925 (7), cannot apply to a case of this kind. That

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(1) (1859) 4 De G. & J. 503.
(2) [1889] W. N. 3.
(3) [1908] 1 Ch. 839.
(4) [1927] 1 Ch. 570.
(5) [1930] 1 Ch. 194, 197.
(6) [1939] Ch. 738.
(7) By s. 75, sub-s. 5: "Capital "money arising under this Act "while remaining uninvested or "unapplied, and securities on "which an investment of any "such capital money is made shall "for all purposes of disposition, "transmission and devolution be "treated as land, and shall be "held for and go to the same "persons successively, in the same "manner and for and on the same "estates, interests, and trusts, as "the land wherefrom the money "arises would, if not disposed of, "have been held and have gone "under the settlement."

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sub-section, therefore, does not apply, and the son is thus not entitled to the proceeds of sale which, accordingly, fall into residue.

Cur. adv. vult.

July 29. COHEN J. read a judgment in which he stated the facts, and continued: Mr. Belsham, for the persons interested in residue, argued that the question was really determined in his favour by the decision of Astbury J. in *In re Flint* (1). The facts in that case are sufficiently set out in the headnote as follows: "A testator who died in 1920 "gave his property to trustees, and settled the entirety upon "trust for various beneficiaries in undivided shares. He "empowered the trustees at any time to sell any part of his "estate, subject to a right of pre-emption thereby given to his "son Alfred over property A at a price to be fixed by the "trustees' valuer before sale. On January 1, 1926, the land "vested in the trustees on the statutory trusts for sale, etc., "under sch. I., part 4, s. 1, sub-s. 3, of the Law of Property "Act, 1925: *Held*, on the construction of the will, that the "right of pre-emption was only intended to attach to an "exercise of the power of sale under the will, and not to a sale "under the statutory trusts or any other extraneous powers. "*Held*, also, that, even if the right of pre-emption was intended "to attach to any sale whatever by the trustees, it was not "enforceable against the statutory trusts of s. 35 either as "an 'equitable interest or power' within s. 3 and s. 205, "sub-s. 1 (ix.), or as an 'additional or larger power' conferred "by the will on the trustees within s. 28, sub-s. 1, as amended "by the 1926 Act schedule; or as an 'incumbrance' within "sch. I., part 4, s. 1, sub-s. 9. *Held*, therefore, that the "trustees on executing the statutory trusts could disregard "the right of pre-emption." That case seems to me, however, to be distinguishable for two reasons. In the first place, Alfred was not given any option to buy at a fixed price. The testator merely directed that he should receive the first offer at a price to be fixed by a valuer at the time when the trustees decided to sell. The valuer would fix a proper price as between willing buyer and willing seller, and it is impossible, therefore, to argue that the intention of the testator by fixing a price was to confer bounty on Alfred. In the second place, the question what right, if any, Alfred might have in the proceeds of sale, was not considered at all. I cannot, therefore, derive assistance in the present case from the decision in *In re Flint* (1).

Mr. Belsham then said, and correctly, that the question was one of construction, that, on the true construction of the testator's will, he intended the option to extend to the land in its original form only, and must be taken to have had in mind the powers which would be exercisable by the tenant for life and deliberately to have exposed the son to the risk that the option might be defeated by the exercise by the tenant for life of her power to sell the land or any part thereof. In my judgment, this argument is not well founded. In the first place, I think that, as a matter of construction, the testator intended that, subject to the life interest of his widow, any benefit which might accrue from the farm over and above the sum of 5000*l.* should enure to the son if he exercised his option, and that the son, having exercised the option, is entitled to the proceeds of sale. This view is supported by the two cases to which Mr. Mulligan directed my attention, namely, *In re Cant's Estate* (2), and *In re Kerry* (3). In the former case the facts are stated in the sidenote as follows: "Land was devised in trust for the testator's widow for life, "and after her death for sale and division of the proceeds "among his children equally, with a direction that the trustees "should offer the land to the testator's son, at a specified price, "upon the death of the widow. The land was purchased by "a railway company, under the powers given by their Act, for "more than twice the specified sum. . . ." It will be observed that the facts were very similar to those in the present case, except that the sale was effected, not under a statutory power in a tenant for life, but under a power conferred on a railway company by a private Act to take the land for the purpose of an extension of their railway. The price paid by the railway company was 1250*l.* as against the sum of 450*l.* at which the testator's son would have been entitled to purchase it under the terms of the will. The son exercised his option on February 5, 1859, six years after the sale to the railway company, and the court held that he was entitled to the 1250*l.* Knight Bruce L.J. said (4): "I conceive that "this right remains not affected by the act, and that the son "is entitled to take the purchase money, whether amounting "to hundreds or thousands, on paying the sum which the

(1) [1927] 1 Ch. 570.

(2) 4 De G. & J. 503.

(3) [1889] W. N. 3.

(4) 4 De G. & J. 503, 507.

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"testator has specified in his will, just as he would have been "entitled to the land itself if it had not been taken by the "railway company." Turner L.J. said (1): "The whole "argument of the respondents rests on this, that the testator "only intended to benefit his son Charles, in the event of his "continuing to be a gardener. The true test of this argument "is, whether, if he had ceased to be a gardener in his father's "lifetime he would still have been entitled to the land. This "question admits of no doubt, and the only consideration "then is, whether, if the right remained at the death of the "testator, the act of parliament subsequently passed can "affect it. I am of opinion that it cannot." In *In re Kerry* (2) options over different parcels of land were given to a son and a daughter. The options could not be exercised over the land itself as it was sold to other parties in a creditor's administration action, but, as is stated in the report (3), "North J. said that *In re Cant's Estate* (4) was an analogous "case, though not a direct authority. Effect ought to be given "so far as was possible to the provisions of the will. The "intention of the testator was that, if the son and daughter "exercised the option to purchase, the other persons entitled "under the will should not receive more than 1500*l.* and "350*l.* from the two properties respectively. The option "was intended to be a benefit; the excess in value above the "price fixed was intended to go to the person to whom the "option was given. The sale in the creditor's action was "not made under the trusts of the will, and, before the persons "interested in the residue could take any benefit, the excess "above the option prices must be paid to the son and daughter "respectively . . . ."

Secondly, I think that the argument addressed to me by Mr. Belsham is inconsistent with the provisions of the Settled Land Act, 1925. The sales and other dealings with the land were effected by the widow in exercise of her powers as tenant for life, and, accordingly, the proceeds are capital moneys within the meaning of the Act, and s. 75, sub-s. 5, therefore applies. The investments and moneys now in question have, therefore, to be held for and go to the same persons successively, in the same manner and for and on the same interests and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the testator's will. The son's right to purchase the land is, I think, in accordance with the decision in *London & South-Western Ry.* v. *Gomm* (1), an interest in land. In that case, by a deed under which the plaintiffs had sold certain land to G. P., G. P. covenanted that he would at any time thereafter, whenever the land might be required for the railway or works of the company, reconvey it to the company on six months' notice and on payment of 100*l.*, and it was held by the Court of Appeal that the effect of this covenant was to give to the company an executory interest in the land. I see no reason in principle why that interest should not be an interest within the meaning of s. 75, sub-s. 5, and, if so, under that sub-section, the trustees are bound to hold the capital moneys on the same trusts as the land wherefrom the moneys arose. This means that they hold the capital moneys and the investments representing the same on trust for sale and conversion, but on trust to sell the same to the son if within twelve months after the death of the testator's widow he signifies his desire to purchase them. The son's right to take the land itself was, no doubt, overriden by the exercise of the powers of the tenant for life, but I see no reason why the exercise of those powers should prevent his right attaching to the proceeds of sale arising from the exercise of her power as tenant for life. Indeed, I think I am bound by the provisions of the Act to hold that they did so attach. I, therefore, hold, on the true construction of the will and in the events which have happened, that the son was entitled to exercise and has validly exercised the option conferred by cl. 12, and, accordingly, is entitled to all the items specified in the summons. The costs of all parties will be taxed as between solicitor and client and paid out of residue.

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(1) 4 De G. & J. 503, 507.

(2) [1889] W. N. 3.

(3) Ibid. 4.

(4) 4 De G. & J. 503.

Solicitors for plaintiff and for son: *Cunliffe & Airy, for Alderson, Son & Dust, Sheffield.*

Solicitor for all other defendants: *F. B. Brook, for A. P. Williamson & Co., Retford.*

(1) (1882) 20 Ch. D. 562.

K. R. A. H.

MORTON J.

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July 28, 29, 30.

B. A. COLLIERIES, LIMITED *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

Mine—Coal mine—Railway—Area of protection—Notice of intention to work minerals—Counter-notice to leave minerals unworked—Compensation payable by railway company—Assessment—Possible liability of mineowner to railway company if minerals worked—Date of payment of compensation—Discount—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 78, *sub-s.* 4 ; *s.* 78A, *sub-s.* 1 ; *s.* 79A, *sub-s.* 1 (*as replaced by Mines* (*Working Facilities and Support*) *Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *s.* 15).

In assessing the compensation payable by a railway company to a mineowner under s. 78A, sub-s. 1, of the Railway Clauses Consolidation Act, 1845, as replaced by s. 15 of the Mines (Working Facilities and Support) Act, 1923, for the loss caused by minerals being left unworked pursuant to a counter-notice served by the railway company on the mineowner under s. 78, sub-s. 2, of the Act of 1845 (as replaced), there must be taken into account the liability imposed on the mineowner by s. 79A of the Act of 1845 (as replaced) to contribute towards the expenses incurred in making good any damage to the railway or railway works which would be caused if the minerals were worked. The compensation is assessable and payable without delay after the service of the counter-notice and in respect of the whole of the sterilized minerals, and is not assessable and payable from time to time as and when the sterilized minerals would have been worked in the ordinary course of mining if no counter-notice had been given, but, in making the assessment, account should be taken of the period or periods in the future when the sterilized minerals would, but for the counter-notice, have been worked, and a proper rate of discount should be applied to the estimated value of the minerals to arrive at their equivalent value at the time of the assessment.

ACTION.

The plaintiffs were "mineowners" within s. 85D of the Railways Clauses Consolidation Act, 1845, as replaced by s. 15 of the Mines (Working Facilities and Support) Act, 1923. Sect. 78 (as replaced) prescribes the conditions under which minerals under railways may be worked, and, by sub-s. 5, defines the "area of protection" in relation to any seam of minerals, dividing it, in certain given circumstances, which existed in the present case, into an inner and an outer area of protection. Sect. 78A deals with compensation for leaving minerals unworked, which, in default of agreement, is to be determined by arbitration. Sect. 79 gives to a mineowner who has served on a railway company, under s. 78, sub-s. 1, notice of intention to work minerals, power to work them if the company has served no counter-notice within thirty days. Sect. 79A deals with the liability of a mineowner in respect of authorized workings.

The plaintiffs, while working their seam, were approaching a tunnel belonging to the defendants, and, on January 24, 1940, served, under s. 78, sub-s. 1, a notice to work the coal lying under the area of protection comprising the defendants' railway and works. On December 30, 1940, the defendants served a counter-notice in respect of part of their railway and works comprised in the notice, thereby sterilizing the coal comprised in the counter-notice area. By this summons, taken out on January 5, 1943, the plaintiffs asked (1.) whether, on the true construction of s. 15 of the Act of 1923, particularly ss. 78 and 78A therein included, in assessing the compensation payable by the defendants to the plaintiffs under the counter-notice, any account ought to be taken of the possible contribution for which the plaintiffs might in the future have become liable under s. 79A if the coal covered by the counter-notice had been worked and the defendants' railway and works had been damaged by that working, and (2.) whether, on a true construction of s. 15, the compensation ought to be assessed and paid at once or not until such time or times as the coal covered by the counter-notice would in the ordinary course have been worked, or for some, and what, other period, and, if the assessment ought to be made at once, whether or not, in making it, a proper rate of discount ought to be applied to the estimated figures of the plaintiffs' loss per ton of coal by reason of the coal being sterilized.

Harman K.C. and *Wilfrid Hunt* for the plaintiffs. On the true construction of the Act, ss. 78 and 78A are one code, which applies where a counter-notice has been served, and s. 79 and the following sections are another code, which applies where a counter-notice has not been served. In contending that, in assessing compensation payable under s. 78A, the provisions of s. 79A should be taken into account, the defendants are seeking to marry the two codes and to take from s. 79A into s. 78A a liability under which the plaintiffs could come only if that had happened which has not. All that has to be ascertained, in assessing compensation under s. 78A, is the profit which the plaintiffs would have made from the coal if they had been free to work it by virtue, not of the Act, but of an unencumbered right: *Bwllfa and Merthyr Dare Steam Collieries (1891)* v. *Pontypridd Waterworks Co.* (1). The provisions of s. 79A are, therefore, irrelevant, and should not be considered in assessing compensation under s. 78A, nor, in assessing compensation, should the fact that the specified minerals go under the defendants' railway be taken into consideration. On the question whether compensation ought to be assessed and paid at once, the plaintiffs rely on the words ". . . . the company shall pay compensa-"tion . . . ." in s. 78, sub-s. 4. Those words mean that assessment and payment are to be once for all: see the opinion of Lord Robertson in *Bwllfa and Merthyr Dare Steam Collieries (1891)* v. *Pontypridd Waterworks Co.* (1). The Act does not provide for any discount, and, therefore, the payment should be made in full. In para. (ii.) of the proviso to s. 78A, sub-s. 1, the words are "the compensation . . . . shall be a sum for "each ton of the specified minerals," and the rate per ton for those under the outer area is to be one-third of the rate per ton for those under the inner area. That makes it quite clear that there is to be no discount. That there is to be no interest is shown by *Richard and Great Western Ry. Co., In re* (2). It would, therefore, be very rough justice to the plaintiffs, that any rate of discount should be applied to their estimated loss per ton of coal by reason of the coal being sterilized.

Bowen K.C. and *J. Herbert* for the defendants. In assessing compensation under s. 78A it must be assumed that sterilized minerals are in fact worked in the usual order of working which would have taken place but for the ban imposed by the counter-notice. In that state of affairs, the liability of the mineowner to contribute under s. 79A would exist, and, therefore, the provisions of s. 79A must not be disregarded in assessing compensation under s. 78A. The plaintiffs' contention is contrary to the Act. They say that, because they are not to work the minerals, they are entitled to leave out of account what would, if the minerals were worked, be an element in the cost of working: *Rugby Portland Cement Co.* v. *London & North Western Ry. Co.* (3). What the defendants can save by the sterilization of the minerals is irrelevant. What is relevant is what the plaintiffs would have made out of the sterilized minerals if they had worked them. Sect. 79A imposes a new working cost which must be taken into account

(1) [1903] A. C. 426.
(2) [1905] 1 K. B. 68.
(3) [1908] 2 K. B. 606.

in assessing compensation under s. 78A. The value of the minerals ought to be treated as deferred. That is to say, if compensation is assessable and payable at once, what the colliery company would have made out of the minerals in due course of time ought to be discounted down to the present time at an appropriate rate, to arrive at the present equivalent value: *Edinburgh and District Water Trustees* v. *Clippens Oil Co.* (1).

MORTON J. Apart from authority, I should have thought that, as the mineowner is to get compensation, under s. 78A, sub-s. 1, for the loss caused by the "specified minerals" being left unworked, the "sum for each ton" which is mentioned in the second paragraph of the proviso to s. 78A, sub-s. 1, should be the price which the mineowner would have got for the coal if he had worked it, less the expenses which he would have incurred in working it. In saying that I have not overlooked that under para. (ii.) of the proviso, in the case of the outer area, the sum per ton when ascertained must be divided by one-third. There are two further views which I should have formed apart from authority. First, it seems to me that, in considering the loss caused, the court has to consider only the particular minerals which are left unworked as a result of the counter-notice. That is made clear by the words of s. 78A, sub-s. 1, "compensation . . . . for the loss caused "by the specified minerals being left unworked." Secondly, in arriving at the loss caused, I think that it is necessary to imagine the mineowner working out the specified minerals. That must be a hypothetical working out, because the minerals have been sterilized by the serving of the counter-notice, but I think that one should consider that hypothetical working out on the footing that no counter-notice has been served and that the mineowner proceeds to work the specified minerals as he is permitted to do by s. 79. These views are supported by the observations of the House of Lords in *Eden* v. *North Eastern Ry. Co.* (2), where Lord Macnaghten, quoting from Lord Penzance in *Smith* v. *Great Western Ry. Co.* (3) said (4): "The full value of the coal, and nothing less than the full "value of the coal, deducting, of course, the cost of getting "it, must be the measure of the compensation which would "be due to the lessee." Again in the same case Lord Atkinson

(1) (1902) 87 L. T. 275.
(2) [1907] A. C. 400.
(3) (1877) 3 App. Cas. 165, 185.
(4) [1907] A. C. 400, 407.

said (1): "If, as in this case, there be no physical difficulty "in the way which would render the working, mining, and "raising of them not reasonably practicable, then a fair test "of that value would be the price the minerals would fetch "as and when won and raised, less the cost of working the "mine, winning and raising them."

It is said by counsel for the plaintiffs that, in ascertaining the expense of getting the specified minerals, the provisions of s. 79A, sub-s. 1, should be disregarded. It seems to me that that would be a surprising conclusion. The liability in respect of authorized workings which is set out in s. 79A, sub-s. 1, is one element in the cost of working the specified minerals, since they are under or near a railway. It is just as much an element in the cost of working as wages paid to the miners who get the coal. No doubt, as the whole process of working is hypothetical, an arbitrator who is assessing compensation under s. 78A, sub-s. 1, must make estimates of one kind or another. He must estimate, for example, what the cost of wages is likely to be. Similarly, I see no reason why he should not also estimate what is the contribution which the mineowner would be likely to have to make to the expenses under s. 79A, sub-s. 1, if the specified minerals were worked out. I do not say that the calculation would be easy, but I see no reason why it should be left out of account altogether.

There are, however, several reasons put forward by counsel for the plaintiffs why this element should not be taken into account. Before I deal with them I would observe that the arbitrator is bound, in making his award, to assume, contrary to the fact, that the coal is worked, and worked in precisely the same way as it would have been had no counter-notice been served. It is said by counsel for the plaintiffs that ss. 78 and 78A are one code which is to apply where the counter-notice is served and that s. 79 and the following sections are another code which is to apply where the counter-notice is not served and that those two bundles of sections cannot be married, as Mr. Harman put it. That, taken by itself, is true. Sects. 78 and 78A do deal with the one case and s. 79 and the following sections do deal with the other case, but, to ascertain what loss has been caused to the mineowner by the fact that the counter-notice has been served, and to arrive at the compensation, it would seem necessary to assume that no counter-notice has been served and that the mines have been worked. Further, counsel for the plaintiffs points out that the figure to be awarded cannot be to the full extent a compensation figure, because there is the arbitrary difference between the inner area and the outer area drawn in para. (ii.) of the proviso to s. 78A, sub-s. 1. That, again, is true, but it seems to me that I must apply some test in deciding what the rate per ton is to be and that the only possible test is that which I have stated, a test which, I think, is in accordance with the rule of the House of Lords in *Eden* v. *North Eastern Ry. Co.* (1) although there the House was dealing with a different Act. Having applied that test, one must then do an arbitrary division sum for the case of the outer area.

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(1) [1907] A. C. 400, 412.

Again, it is said by counsel for the plaintiffs that it is irrelevant, for the purpose of assessing the compensation, that there happens to be a railway over the specified minerals. I cannot accept that contention. The question is what loss has been caused by the mineowners being prevented from working the specified minerals which happen to be under a railway, and I do not see why the arbitrator should disregard that fact in assessing the loss caused to the mineowner in respect of these minerals. Counsel submits that the damage visualized by s. 79A, sub-s. 1, may never happen, and that, if the arbitrator is going to embark on this inquiry, he will have to determine the amount of the damage which would be caused to the railway company's works and the amount of the contribution which would have to be made by the mineowner. It is said that that is imposing on the arbitrator under ss. 78 and 78A a task which has to be discharged only if there is an actual determination by the arbitrator under s. 79 and the following sections. I am disposed to agree that it may be necessary for the arbitrator in such a case as the present to enter into these matters and form some judgment on them. The mineowners would have to establish their loss of profit, and it would be open to the railway company to establish that, if the specified minerals were worked, there would be damage to their works and a contribution would have to be paid. It seems to me that the arbitrator would have to take those matters into account in arriving at a proper estimate of the compensation. It may be that when he has taken into account the possible contribution under s. 79A, sub-s. 1, he may think that it is a matter of very small moment, and that a trifling sum should be allowed in respect of it. That depends on the

(1) [1907] A. C. 400.

circumstances, but it affords no reason why he should not take the matter into account.

Another argument advanced by counsel for the plaintiffs was that, if the liability under s. 79A, sub-s. 1, was to be taken into account, it would be impossible for the mineowner to take advantage of sub-s. 3 of that section and to deduct the one-third of the contribution from the payments made by way of royalty to the royalty owner. This, they said, could not be done, because there was no actual working and no actual contribution. Here, again, the answer is reasonably clear. The arbitrator would, no doubt, take into account, in assessing what estimate should be placed on the liability of the mineowner under s. 79A, sub-s. 1, the fact that one-third of that liability would be passed on to the royalty owner by deduction. Assuming that the deduction would otherwise have been sixpence, the arbitrator might conclude that it ought to be fourpence. I can see nothing unfair to the mineowner in that.

Again, it was pointed out that s. 79B imposes certain obligations on the railway company, and that they will be saved all those obligations, involving trouble and expense, if a counternotice has been served. That may be true, but I have to deal with the Act as I find it. From that aspect of the matter it seems to me to be irrelevant to consider that the railway company might be saved a certain amount of trouble and expense. I am considering what the mineowner has suffered, not what the railway company have gained.

Again, counsel draw attention to s. 79A, sub-s. 4, which imposes a limitation on the liability of a mineowner, and they say that a point might be arrived at where no sum whatever was payable by the mineowners, by reason of their having worked some other seam, and that it is not in accordance with the Act to put that task on the arbitrator under s. 78 and s. 78A. The answer is that, if the arbitrator has to take s. 79A into account, he must do so as a whole, and that is one of the matters which would fall for consideration. The result is that, in my opinion, the answer to question one of the summons is in the affirmative.

I now pass to question two, on which I have arrived at a conclusion in favour of the plaintiffs. I am told that there is no authority on this matter, but the wording of s. 78, sub-s. 4, is: "The company shall pay compensation." There is no indication that the payment is to be delayed, and the natural meaning of the words is that compensation is to be paid once

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and for all. Any other interpretation would cause difficulty. For example, if that is not the true meaning, there might have to be a series of arbitrations every two or three years during a hypothetical period, during which the mines might have been worked out. That would be a very complicated matter. Sect. 78A, sub-s. 4, contemplates an immediate arbitration. It is to be observed that para. (iii.) of the proviso shows that, in the case of the royalty owner, there is to be one compensation, based on the sums which he would have received in the future, and it is to be observed, further, that, by para. (iv.), the arbitrator must state in his award the tonnage of the specified minerals on which his award is based. Having regard to the definition of "the specified minerals" in s. 78, sub-s. 2, I do not think that this "stating" in his award has anything to do with stating the minerals worked out from time to time. That assists me in coming to the conclusion that the compensation is to be assessed once and for all. Furthermore, in *Bwllfa and Merthyr Dare Steam Collieries (1891), Ld.* v. *Pontypridd Waterworks Co.* (1), a decision under the Waterworks Clauses Act, 1847, Lord Robertson said: "I do "not mean that the proper course in awarding compensation "is to wait for the expiry of the period required for working "out the coal. On the contrary, it is natural that the compensation should be assessed once for all and by estimate." Although that was said with reference to a provision of a different Act, it applies equally in the present case, and fortifies me in the conclusion at which I should have arrived on the wording of the Act.

I now come to the second part of question two, namely, whether, in assessing the compensation, a proper rate of discount ought to be applied to the estimated figure which the plaintiffs have lost per ton of coal by reason of the coal being sterilized. In my view, in arriving at compensation for "the loss caused by the specified minerals being left unworked," it would be wrong to give compensation on the basis that all the specified minerals are worked out at one blow and at the same moment. If the contention for the plaintiffs were right, the assessed compensation would be equal to the aggregate of all the assumed future profits, and that sum, if it were invested, would produce at the end of the hypothetical period of working out the minerals considerably more than the mineowner would, in fact, have got in pounds, shillings and

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(1) [1903] A. C. 426, 432.

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pence if he had worked out the minerals year by year. I am not asked to state the precise footing on which the discount should be calculated, but that there should be a discount is reasonably clear, bearing in mind that the object in view is to estimate the loss caused by the minerals being left unworked. Mr. Harman pointed out that under s. 78A, sub-s. 1, proviso (ii.), the compensation is to be " a sum for each ton of "the specified minerals," and that there is then a reference to the rate per ton in the case of minerals under the outer and inner area respectively. I do not think, however, that these words indicate that there must be no discounting. First, the rate per ton must be worked out and must be divided by three in the case of the minerals in the outer area, and it must then be considered what, on that basis, is the fair compensation to be given, bearing in mind that the minerals will be worked out year by year over a considerable period in the course of working. To fail to give discount would be to disregard the fact that the minerals have to be worked out over a considerable period. Mr. Harman suggests that the minerals have already been sterilized for some time and that the award has not yet been made and no interest is payable to his clients in respect of that period because no debt has arisen, so far, from the railway company to the plaintiffs. He refers to *In re Richard and Great Western Ry. Co.* (1). That may well be so. I think that it is conceded that no interest will, in fact, be payable during that period. Mr. Harman then says that it would be rough justice, if there is no interest, that there should also be no discount. It may be that the absence of interest involves a certain amount of hardship to the mineowner, but I do not think that it would be rough justice to do as Mr. Harman suggests. Again, one has got to get back to the first point of all, which is that compensation is to be paid for the loss caused by the specified minerals being left unworked. The claim which the mineowners are making is under the Act, and the compensation which they are to obtain as a result of that claim must be compensation ascertained under the Act. In my view, on the true construction of the Act, there is no reason why a proper rate of discount should not be applied, and there is, I think, every reason why it should be applied, having regard to the object which is desired to be attained. I, therefore, declare on question two that the compensation ought to be assessed now, but that a proper

(1) [1905] 1 K. B. 68.

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rate of discount ought to be applied in making the assessment.

The plaintiffs will pay to the defendants one-third of their costs.

Solicitors for plaintiffs: *Gregory, Rowcliffe & Co.*
Solicitor for defendants: *W. H. Hanscombe.*

K. R. A. H.

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July 23, 30.

In re VISCOUNT FURNESS (DECEASED).

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Administration—General Administration—Powers of executor and trustee after decree—Need of leave of the court to exercise.

Where an action to administer the estate of a deceased person has been begun and a decree made therein for general administration, the powers of the trustees of selling the property, investing moneys and managing the estate are completely suspended for the time, and all subsequent transactions must be subject to the previous sanction of the court, which will be readily given if the court is satisfied that the proposed transaction is a proper one. This rule prevails even if the accounts and inquiries ordered are not to be proceeded with except with the leave of the judge in person.

Bethell v. *Abraham* (1873) L. R. 17 Eq. 24 followed.
Berry v. *Gibbons* (1873) L. R. 8 Ch. 747 distinguished.

ADJOURNED SUMMONS.

The testator, Viscount Furness, by his will, dated February 3, 1936, appointed the plaintiff sole executor and trustee thereof. The testator died on October 6, 1940, leaving his widow and a younger son, Antony, surviving him, both of whom were entitled under the will. The plaintiff proved the will, together with certain codicils, on December 18, 1940. The testator's elder son, Christopher Furness, an officer in the Welsh Guards, was last heard of on May 24, 1940, when he was in action while on active service. On April 7, 1941, leave was granted by the Probate Division to swear the death of Christopher Furness on or since May 24, 1940. No evidence was available to prove positively that he had been killed in action. Having regard to the doubt whether Christopher Furness did or did not survive his father and certain other matters, the plaintiff applied to the court for an order for general

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administration. On November 24, 1941, Bennett J. made an order which, so far as material, was in the following terms: "The judge doth declare that the trusts of the will and codicils "of the testator ought to be performed and carried into "execution and doth order the same accordingly. And the "plaintiff by his counsel submitting to account It is ordered "that the following accounts and inquiries be taken and made "that is to say: 1. An account of the property (not specifically "devised or bequeathed) of the testator come to the hands of "the plaintiff the executor of his said will and codicils or to "the hands of any other person or persons by the order or "for the use of the plaintiff distinguishing between capital and "income; 2. An account of the testator's debts; 3. An "account of the testator's funeral and testamentary expenses; "4. An account of the legacies and annuities given by the "testator's will and codicils; 5. An inquiry what parts (if any) "of the testator's property are outstanding or undisposed of "and whether any part of such property so outstanding or "undisposed of is subject to any and what incumbrances. "And it is ordered that the testator's property (not specifically "devised or bequeathed) be applied in payment of his debts "and funeral and testamentary expenses and afterwards in "payment of the legacies and annuities given by his said will "in a due course of administration. But none of the above "accounts and inquiries except that numbered 2 is to be "prosecuted in chambers except with the leave of the judge in "person."

The plaintiff now, by summons dated June 10, 1943 (omitting para. 1 of the summons, which is immaterial), asked: "2. That directions may be given whether, notwithstanding the order for general administration made herein on "November 27, 1941, the plaintiff is at liberty to dispose of, "deal with, and distribute the assets of the testator's estate "(both real and personal) in a due course of administration "without the sanction of the court having been first obtained. "3. If the plaintiff has no such power of disposing of or dealing "with the assets of the estate that he may be given such "general powers of disposition as to the court may seem "meet."

Raymond Jennings for the plaintiff. The plaintiff asks for the directions of the court as to the effect on his powers of the order for general administration made in November, 1941.

As the order directs that the estate is to be applied, first, in payment of testamentary expenses, debts and legacies, and that inquiries, other than the inquiry for debts, are not to be proceeded with in chambers without special leave, it is submitted that it does not oust or affect the ordinary powers of the executor to sell any assets for payment of death duties, debts and legacies. The authorities, however, are not clear, and the text-book writers are not in agreement on the question. Daniell's Chancery Practice, 8th ed., vol. i., p. 916*n*, suggests that an executor can still exercise his ordinary powers, but Lewin on Trusts, 14th ed., p. 313, says: "If a suit has been "instituted, and a decree made for the execution of a trust the "powers of the trustees are thenceforth so paralysed that the "authority of the court must sanction every subsequent proceeding . . . . a trustee for sale cannot sell without such "authority": *see Berry* v. *Gibbons* (1); *In re Mansel* (2); *Walker* v. *Seligmann* (3); *Irby* v. *Irby* (*No.* 3) (4). In *Walker* v. *Smallwood* (5), Lord Camden L.C. said that where a trustee had parted with the execution of the trust to the court it would be inconvenient to permit a sale but by leave of the court, and he set aside a sale by an executor of land charged with debts. The question is also dealt with shortly in *In re Sales* (6), and *In re Johnson* (7). It is submitted that an executor retains his powers of sale after an administration decree. At any rate he does so here, where the decree has not been proceeded with. If the plaintiff does not retain those powers, I ask that all necessary powers of sale for payment of death duties, etc., be conferred on him.

Winterbotham for the widow of the testator, supported the application, and referred to Daniell's Chancery Practice, 8th ed., vol. i., p. 916*n*, and Williams on Executors, 12th ed., pp. 1277, 1278. The statements in these text-books are not altogether in agreement. According to Williams, the rule is that after an administration decree all the powers of the trustees are subject to the direction of the court. They can still exercise their discretion after the order, but only by leave of the court: see *In re Cotter* (8); *Bethell* v. *Abraham* (9); *In re Alpha Co., Ld.* (10).

(1) (1873) L. R. 8 Ch. 747.
(2) (1885) 33 W. R. 727.
(3) (1871) L. R. 12 Eq. 152.
(4) (1858) 25 Beav. 632.
(5) (1768) Ambler. 677.
(6) [1920] W. N. 54.
(7) [1940] W. N. 195.
(8) [1915] 1 Ch. 307.
(9) (1873) L. R. 17 Eq. 24.
(10) [1903] 1 Ch. 203, 206.

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McMullan for Antony Furness supported the application.

Cur. adv. vult.

July 30. MORTON J. read a judgment in which, having stated the facts and read the order, he continued: There is nothing unusual in the terms of the order which I have just read, and it appeared to me, when the case was opened before me, that the answer to question two must be "No." My attention was called, however, to certain statements in well-known text-books which seemed to support a contrary view and I reserved my judgment on question two as it seemed most desirable that any doubts which exist on this important point should be removed. In the meantime, at the request of counsel for the plaintiff, and without objection by counsel for for the defendants, I gave the plaintiff leave under para. 3 of the summons to sell certain assets of the estate and to apply the proceeds either in payment of duties or in the purchase of trustee investments.

On the question raised by para. 2 of the summons, there is a remarkable difference of opinion among the authors of well-known text books. In Daniell's Chancery Practice, 8th ed., vol. i., p. 916, I find the following statement in footnote (*n*): "The ordinary judgment does not take away from "the personal representative the power of dealing with the "assets unless an injunction be granted to restrain such dealing "or a receiver is appointed." *Berry* v. *Gibbons* (1) is cited as the authority for this statement. In Williams on Executors, 12th ed., p. 569, I find the following more guarded statement: "After an order for administration has been made "an executor cannot safely exercise any power without the "sanction of the court, but it would seem that the power to "mortgage the assets is not taken away by an order for "administration where no receiver has been appointed and "no injunction granted." Certain cases, including *Berry* v. *Gibbons* (1), are cited. On p. 1278 of the same work it is said: "An administration order does not prevent trustees "from exercising a power of sale" and reference is made to *In re Mansel* (2). Lewin on Trusts, 14th ed., p. 313, states the law as follows: "The powers assigned in the preceding "pages to trustees must be taken subject to the qualification "that, if a suit has been instituted, and a decree made for the

(1) L. R. 8 Ch. 747.

(2) 33 W. R. 727.

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"execution of the trust, the powers of the trustees are thence-"forth so far paralysed that the authority of the court must "sanction every subsequent proceeding. Thus the trustees "cannot commence or defend any action or suit, or interfere "in any other legal proceeding, without first consulting the "court as to the propriety of so doing; a trustee for sale "cannot sell; the committee of a lunatic cannot make repairs; "an executor cannot pay debts, or deal with the assets for the "purpose of investment. Though an executor may be per-"sonally liable if he exercises a power after decree, he can, "as regards a chattel not specifically the subject of the suit, "give a good title to a bona fide purchaser not having actual "notice of the lis pendens." (At that point there is a reference to *Berry* v. *Gibbons* (1) :) "And it is presumed he can equally, "where there is no receiver appointed, sign a valid receipt "for any part of the testator's personal estate. Where an "administration action has been heard on further consideration "and no subsequent further consideration has been reserved "but general liberty to apply has been given, trustees may "exercise their power without obtaining the sanction of the "court."

In my judgment, after an order for general administration has been made, a trustee is not at liberty to sell, deal with or distribute the assets of the testator's estate without obtaining the sanction of the court.

In *Bethell* v. *Abraham* (2), after a decree for administration, two of the trustees of the testator's will took out a summons asking that they might be at liberty to sell certain of the testator's investments and to invest the proceeds and also the moneys receivable on the testator's policies of insurance, in certain specified securities, comprising United States Federal Funded 5*l.* per cent., Baltimore and Ohio Railway 6 per cent. Bonds, etc. The summons was adjourned into court and was supported by the affidavits of the plaintiffs and of another of the trustees who stated that they were desirous of exercising the discretion conferred on them by the will in manner proposed by the summons. It appeared that the testator had, at the time of his death, considerable sums invested in similar though not precisely identical securities. Sir George Jessel M.R. said (3) : "I am not satisfied that the trustees have the "power they claim. It is not necessary for me at the present

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(1) L. R. 8 Ch. 747.

(2) L. R. 17 Eq. 24.

(3) Ibid. 27.

"moment to say more than that. I have already indicated "in the course of the argument why I am not satisfied on that "point." I pause there to say that the extent of the trustees' power depended on the construction of certain passages in the testator's will. Then the Master of the Rolls proceeded: "But if they have the power they claim, I am not "satisfied that I ought to exercise the power (which I un-"doubtedly have) of controlling their exercise of discretion "in the way which they desire, namely, by acceding to the "request to make these investments which, in the eye of this "court, are speculative. I do not say they are really such, "for that I know nothing about; but they are speculative "so far as this court is concerned so that even if I thought the "construction of the will other than I do think it, I should not "grant this application. However, I should like to say this, "that (if I rightly understand the doctrines of the court) as "long as an estate remains to be administered in this court, "the court does not allow a purchase to be made, or a mort-"gage, or any other investment to be made, unless the court "is satisfied of its safety." The Master of the Rolls goes on to explain the reason for that. I am not aware of any case which throws doubt on the correctness of the observations which I have just read.

In *Berry* v. *Gibbons* (1): "a decree was made in a creditor's "suit for the administration of the personal estate of a testator, "but no receiver was appointed nor any injunction granted "to restrain the executrix from dealing with the assets." I am quoting from the head note. "More than two years "after the decree, and nearly three years after the death of "the testator, his executrix, who was also his sole legatee, "opened an account with a bank, headed 'E. G. Executrix "'of B. G.' In the following year, the account being over-"drawn, she deposited with the bank a picture belonging to "the testator's estate to secure the balance then due and "further advances. It appeared that the bankers did not "know of the suit, and had no notice of any breach of duty "on the part of the executrix." James L.J. said: "It is quite "clear to me that the appellants must have the value of the "picture. Whether they will ever get anything more is a "matter which must be determined hereafter, but I should "not be disposed to give any encouragement to a claim for "anything more. It appears that the account opened by

(1) L. R. 8 Ch. 747.

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"this lady with the bank was opened as an executorship "account, and the bank had no notice of any breach of trust. "They afterwards obtained from her, she being both the "executrix and universal legatee, the deposit of a picture "as security for the balance of that account and for further "advances. Further advances were made, and, in my "judgment, the executrix had the legal right to make such a "deposit; and in order to deprive them of the benefit of it "there must be evidence to show that they had notice of there "being some breach of trust in the transaction. Now it "appears to me that the bankers did nothing but what was "in the usual course of business, and that there is nothing to "fix them with any notice of a breach of trust. The doctrine "of lis pendens has no bearing on the case, for a mere adminis-"tration decree, no receiver having been appointed, nor any "injunction granted to prevent the executrix from dealing "with the assets, would not take away her legal powers so as "to invalidate the title of persons claiming under a disposition "made by her in exercise of those powers." I think that the words "would not take away her legal powers" must be read in view of and in connexion with the words which followed, "so as to invalidate the title," and so on. In my view, *Berry* v. *Gibbons* (1) merely decides that after an order for general administration an executrix can so deal with a specific chattel as to give a good title to a purchaser or lender who has no notice of the order. It does not decide that, in so acting, the executrix is not guilty of any breach of duty. In fact, I think that the language of James L.J. indicates the contrary view. As to *In re Mansel* (2), it is not an authority for the proposition stated in Williams on Executors at p. 1278. The effect of it is correctly summarized in the last sentence of the passage from Lewin, which I have already quoted.

It is contended by counsel for the plaintiff that, whatever may be the effect of an order for general administration in the ordinary form, the executor is given power to deal with the assets in the present case by the joint effect of the words, "And it is ordered that the testator's property (not specifically "devised or bequeathed) be applied in payment of his debts "and funeral and testamentary expenses and afterwards in "payment of the legacies and annuities given by his said will "in a due course of administration" coupled with the words "But none of the above accounts and inquiries except that

(1) L. R. 8 Ch. 747.

(2) 33 W. R. 727.

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"numbered 2 is to be prosecuted in chambers except with the "leave of the judge in person." He contends, as I understand him, that the testator's property can only be so applied by the court when all the accounts and the inquiries have been taken and made, and that, if the court is only proceeding with the inquiry as to debts, it must have been intended that the trustee should proceed with the application of the testator's property in due course of administration, otherwise there would be a deadlock. I think there is a threefold answer to this argument. First, the order is an order for general administration, although only one account is to be proceeded with in the meantime, and the effect of such an order is that which I have already stated. Secondly, the words "and it is "ordered," etc., are common form and confer no authority on the trustee. Thirdly, there is, in fact, no deadlock. The trustee can always apply for the sanction of the court to any particular transaction or type of transaction, and this he has done by para. 3 of the present summons. Further, he can apply to the court to proceed with the other accounts and inquiries if and when this becomes desirable. For these reasons I answer question two of the summons in the negative.

Solicitors: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland; Theodore Goddard & Co.; Dollman & Pritchard.*

NOTE.—A similar decision on the general rule here stated, that executors cannot act after an administration decree, except under the sanction of the Court was given by the House of Lords in *Minors* v. *Battison* (1876) 1 App. Cas. 428. This case, which was not referred to in argument in *In re Furness*, mainly concerned the construction of a will, and the point as to the effect of an administration order only arose incidentally. It was not reported in any lower court.

H. L. L.

COHEN J.
1943
June 8, 9, 10;
July 6.

In re PRICE.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* HARWOOD.

Will—Gift to unincorporated association for certain objects—Limited purpose—Perpetuity—Freedom of association to spend capital and income on stated purpose—Charitable bequest.

COHEN J.

1943

PRICE, *In re.*

MIDLAND BANK EXECUTOR AND TRUSTEE CO. *v.* HARWOOD.

A testatrix by her will gave one-half of her residuary estate to the Anthroposophical Society in Great Britain "to be used at "the discretion of the chairman and executive council of the "society for carrying on the teachings of the founder, Dr. Rudolf "Steiner." The society was an unincorporated association, of which the testatrix was a member, and it was affiliated to a wider incorporated association with a similar name. The society held a lease from the parent association of a London house containing a library and rooms for meetings and study:—

Held, (1.) that, under the terms of the will, there was no absolute gift to the society, but that the society was at liberty to spend both capital and income on the objects defined in the will, and, there being no perpetuity created, the bequest was valid: *In re Drummond* [1914] 2 Ch. 90 followed; (2.) that it was a valid charitable gift.

ADJOURNED SUMMONS.

By her will, dated June 13, 1940, the testatrix, Mrs. Inez Ethel Price, appointed the plaintiffs to be the executors and trustees thereof, and, after giving certain property to her daughter, the defendant, Gladys Freda Price, and some pecuniary legacies, she directed her trustees to hold her residuary estate as to one quarter for her son, the defendant, Stanley Vernon Price, as to another quarter for her son, the defendant, Raymond Selwyn Price, and as to the remaining half to the "Anthroposophical Society in Great Britain to be "used at the discretion of the chairman and executive council "of the society for carrying on the teachings of the founder, "Dr. Rudolf Steiner."

The society was an unincorporated voluntary association founded in 1923 at a meeting at which Dr. Rudolf Steiner was appointed president for life. It was financed entirely by members' subscriptions and donations, and had its headquarters at Rudolf Steiner House, 35 Park Road, London, W. The headquarters consisted of a bookshop, library and lecture rooms, all of which the society occupied as tenant of the Anthroposophical Association, Ld. Its constitution was divided into three parts, statutes, rules and bye-laws. The statutes were in the following terms: "2. The aim of the "society is to form, in the words of Rudolf Steiner, a union of "human beings who desire to further the life of the soul, both "in the individual and in human society, on the basis of a true "knowledge of the spiritual world. 3. The society will endea"vour to fulfil its tasks: (*a*) by providing adequate facilities "for individual study and mutual aid in the study of spiritual "science; (*b*) by encouraging practical activities which will "bring into the civilization of our time the beneficial results "of spiritual science .... 5. The society is an entirely "public organization and in no sense a secret society. It is "averse to any sectarian tendency and does not consider "politics to be among its tasks. A dogmatic position in any "sphere whatsoever shall be excluded from the society." "Spiritual science," it was stated in evidence, was one of the two names ordinarily used by Dr. Steiner for the subject-matter of all his writings and teachings. The other name was "anthroposophy"—the wisdom of mankind. Bye-law 3 provided: "The control of the affairs of the society shall be in the "hands of an executive council consisting of twelve members "of the society, including the hon. treasurer. The secretary "of the society shall be appointed by the council. The hon. "treasurer shall be appointed by the annual general meeting "once every three years and be nominated in the same way as "other members of the council."

The testatrix died on July 12, 1940, and her will was proved on November 28, 1940. She left surviving her the sons and daughter mentioned. By this summons the trustees asked (inter alia) whether the gift of one-half of the residuary estate was one to the society absolutely for its general purposes, or on a charitable trust, or whether it was undisposed of, and, if the gift created a charitable trust, that a scheme for its administration might be directed.

J. A. Hay for the plaintiff, trustee of the will.

Roxburgh K.C. and *Belsham* for the defendant, Harwood, chairman of the executive council of the society. This is an absolute gift to the society for its general purposes: *In re Clarke* (1). If, however, a trust is created, there is no perpetuity, as there is nothing to prevent the society from spending the whole of the money on its objects: *In re Drummond* (2), and this distinguishes the case from *Macaulay* v. *O'Donnell* (3), where *In re Drummond* (2) was approved by the House of Lords. In any event, the trust is charitable as being for mental, moral, or religious improvement. It is not necessary to show that the teaching of Rudolf Steiner must be of moral or spiritual value. It is sufficient to show that it may be so: *Thornton* v. *Howe* (4). The teaching of moral

(1) [1901] 2 Ch. 110.
(2) [1914] 2 Ch. 90.
(3) July 10, 1933. *See* Note, p. 435 post.
(4) (1862) 31 Beav. 14.

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philosophy is educational, and, therefore, charitable: *In re Scowcroft* (1); *In re Hummeltenberg* (2). The trust is one which the court would have no difficulty in administering, and it does not fail for uncertainty.

Vaisey K.C. and *H. E. Salt* for the two sons of the testatrix. This is not a gift to the society for its general purposes so that the members could divide it up among themselves or apply it as they liked. It is a gift on a specific trust, namely, to carry on the teachings of Dr. Steiner, that is to say, to carry them on indefinitely and perpetually. The gift constitutes an endowment fund and it is void for perpetuity unless it is both charitable and certain. *In re Drummond* (3) does not apply. The onus rests on the society to show what the teachings of Rudolf Steiner are, but from the evidence it would seem impossible to crystallize his ideas in a teachable form. The trust, therefore, is void for uncertainty, for the court could not control it in any way: *In re Ashton* (4); and see *In re Hummeltenberg* (2), where a bequest to the London Spiritualistic Alliance for training mediums was held to fail. *Thornton* v. *Howe* (5) is distinguishable because there the trust "for printing, "publishing and propagating the sacred writings of Johanna "Southcote" was for a certain and specific purpose. If, as here, any parts of the object are contradictory or unascertainable the whole trust is invalid. The purpose of the trust cannot be the advancement either of religion or education. This case is really on all fours with *Macaulay* v. *O'Donnell* (6).

Myles, for the testatrix's daughter, supported this argument, and referred to *Bowman* v. *Secular Society* (7), where Lord Parker doubted whether a trust for the promotion of a principle as definite as Kant's categorical imperative would be charitable.

Danckwerts, for the Attorney-General, took no part in the argument.

Roxburgh K.C. replied.

Cur. adv. vult.

July 6. COHEN J. read a judgment in which, after stating the facts and reading the material statutes and rules, he continued: The first question which I have to determine is the validity of the gift of one-half of the residuary estate to the Anthroposophical Society in Great Britain. It will be observed that the expression "teachings of Dr. Rudolf Steiner" does not appear in the statutes of the society, but it would be clearly within the ambit of the activities of the society to carry on those teachings and, indeed, Mr. Harwood, the chairman of the executive council of the society, says that this has, in fact, been the sole purpose for which the society was founded and now exists. The objects of the society, are, however, not necessarily limited to those expressed in its existing statutes, for under the rules there is power to alter the statutes in manner therein specified, and there is no limit to the nature of the alterations that can be effected. It is also to be observed that there is no provision in the constitution as to endowments or for the appointment of trustees in whom such endowments should be vested. There appears, however, from Mr. Harwood's affidavit to be an incorporated body, the Anthroposophical Association, Ld., which is the landlord of the premises occupied by the society. I have no evidence of what other functions this incorporated body performs. The testatrix herself is stated by Mr. Harwood to have been an active and enthusiastic member of the society for six years before her death, and from 1938, until shortly before her death, to have been assistant treasurer thereof. She was also a donor of moneys to the Anthroposophical Association, Ld.

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(1) [1898] 2 Ch. 638.
(2) [1923] 1 Ch. 237.
(3) [1914] 2 Ch. 90.
(4) [1938] Ch. 482.
(5) 31 Beav. 14.
(6) July 10, 1933. *See* Note, p. 435 post.
(7) [1917] A. C. 406, 445.

Mr. Roxburgh, for the society, invited me to uphold the validity of the gift on three grounds: (i.) that it was an absolute gift to the society; (ii.) on the principle of *In re Drummond* (1) that, although given for a particular purpose, there was nothing to prevent the society expending capital as well as income on that object; (iii.) as a valid charitable gift.

In support of the first ground, Mr. Roxburgh referred me to *In re Clarke* (2), where Byrne J. lays down the principles to be applied in determining the validity of gifts to perpetual institutions as follows: "It is, I think, established by the "authorities that a gift to a perpetual institution not charitable "is not necessarily bad. The test, or one test, appears to be, "will the legacy when paid be subject to any trust which will "prevent the existing members of the association from spending "it as they please? If not, the gift is good. So also if the

(1) [1914] 2 Ch. 90.

(2) [1901] 2 Ch. 110, 114.

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"gift is to be construed as a gift to or for the benefit of the "individual members of the association. On the other hand, "if it appears that the legacy is one which by the terms of the "gift, or which by reason of the constitution of the association "in whose favour it is made, tends to a perpetuity, the gift is "bad." Mr. Roxburgh, relying, no doubt, on Mr. Harwood's statement that the carrying on of the teachings of Rudolf Steiner was the sole purpose of the society, said that the phrase "to be used at the discretion of the chairman and "executive council of the society for carrying on the teachings "of the founder, Dr. Rudolf Steiner" were merely descriptive and did not limit the objects to which the testatrix's gift could be applied. I am unable to accede to this argument. In the first place, much of the statutes, and, particularly, No. 3, seem clearly to go outside this purpose. In the second place, there is an unlimited power to alter the statutes, and it would, therefore, be possible to include in the objects of the society purposes entirely unconnected with the teachings of Rudolf Steiner. In my judgment, the testatrix clearly intended to limit the purposes to which her benefaction could be applied to carrying on these teachings. I am unable, therefore, to hold that there was an absolute gift to the society.

I turn to the argument based on *In re Drummond* (1). In that case the testator devised and bequeathed his residuary, real and personal estate to his trustees on trust for sale and conversion and to hold the proceeds on trust for the Old Bradfordians' Club, London (being a club for old boys of the Bradford Grammar School), to be used as the committee of the club should think best in the interests of the club or school. Eve J. dealt very shortly with this question (2). He said he could not hold, as the result of the will and codicil together, that the residuary gift of realty and personalty for the Old Bradfordians' Club was a gift to the members individually. There was, in his opinion, a trust, but there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity: *In re Clarke* (3). The legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended. In his opinion, therefore, there was a valid gift to the club for such purposes as the committee should determine

(1) [1914] 2 Ch. 90, 97.
(2) Ibid. 97.
(3) [1910] 2 Ch. 114.

for the benefit of the old boys or members of the club. That case was approved by the House of Lords in *Macaulay* v. *O'Donnell* (1). It was there pointed out by Lord Buckmaster that the feature which distinguished the gift in *In re Drummond* (2) from such gifts as bequests for the maintenance of a library was that in the latter class of cases the bequest was an endowment, the income only being available for the stated purpose, whereas in *In re Drummond* (2) the capital and income of the bequest, according to the construction placed on it by the court, could be freely expended as the committee thought fit in the interests of the club. I will read the relevant passages from Lord Buckmaster's speech. Lord Buckmaster said: "In the first place it is clear that the mere fact that the "beneficiary is an unincorporated society in no way affects "the validity of the gift. A group of people defined and "bound together by rules and called by a distinctive name "can be the subject of a gift as well as any individual or "incorporated body. The real question is what is the actual "purpose for which the gift is made. There is no perpetuity "if the gift were for the individual members for their own "benefit, but that, I think, is clearly not the meaning of this "gift. Nor again is there a perpetuity if the society is at liberty "in accordance with the terms of the gift, to spend both capital "and income as they think fit. *In re Drummond* (2) is an "excellent illustration of this. There, there was a gift upon "trust for the Old Bradfordians' Club to be utilized as the "committee of the club thought best in the interests of the "club. It was held that the words did not prevent the "committee of the club from spending the money in any "manner they might decide was for the benefit of the club "and it was therefore good; but, on the other hand, in *Carne* v. "*Long* (3), a gift to a library at Penzance 'to hold for the use, "'benefit, maintenance, and support of the library' was held "a gift in perpetuity. These two cases illustrate exactly "the point for consideration. If the gift is to be an endow-"ment of the Society, to be held as an endowment, and the "society is, according to its form, perpetual, the gift is bad, "but if the gift is an immediate beneficial legacy, it is good."

Into which category does the bequest I am considering fall? There is nothing on the face of the will to restrict the freedom of the society to expend capital and income on the

(1) July 10, 1933. *See* Note, p. 435 post.

(2) [1914] 2 Ch. 90.

(3) (1860) 2 De G. F. & J. 75.

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stated purpose, but Mr. Vaisey invited me to hold that the expression "carrying on" necessarily connotes permanency which can only be achieved if I construe the will as intending to create an endowment. He referred to the decision in *Macaulay* v. *O'Donnell* (1). In that case the testatrix gave her residuary estate to "the Folkestone lodge of the Theosophi-"cal Society (but not to the headquarters or other lodges of "such society) absolutely for the maintenance and improve-"ment of the Theosophical Lodge at Folkestone." Both Clauson J. and the Court of Appeal held that the effect of this gift was to entitle the Folkestone lodge of the Theosophical Society to expend both capital and income on the specified purpose. In the judgment of both courts considerable reliance was placed on the word "absolutely." The House of Lords, however, took a different view. It will be sufficient if I refer to the speech of Lord Tomlin. He said: "That the lodge to "be maintained is a body or association of persons and not "the building occupied by such body or association I have no "doubt. Further, the fact that the gift is made to the lodge "by the name prescribed by its rules, namely, the Folkestone "lodge of the Theosophical Society, and is coupled with an "express exclusion from the benefit of the gift of the head-"quarters and other lodges of the society makes it plain "that it is the local body or association at Folkestone and no "other body which is to benefit. Why, then, were there added "the words 'for the maintenance and improvement of the "'Theosophical Lodge at Folkestone'? To my mind these "words have been added in order to express that it is the "permanency of the lodge at Folkestone which the testatrix "is seeking to secure, and this, I think, necessarily involves "endowment. The use of the word improvement in addition "to the word maintenance does not, in my opinion, weaken "the argument. If endowment is of the essence of the "gift in order to secure the purpose of maintenance there "is nothing inconsistent in making that which is available "for expenditure on maintenance, namely, the income of the "fund, available also for some other purpose, such as improve-"ment." Mr. Vaisey argued that the words "carrying on" in the present case correspond to the word "maintenance" in *Macaulay* v. *O'Donnell* (1), that it necessarily implies permanency and that such permanency can only be achieved through an endowment. The question is, however, purely one of

(1) July 10, 1933. *See* Note, p. 435, post.

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construction of the particular document, and I have come to the conclusion that, on the construction of the will before me, the society is free to expend the capital of the gift in carrying on the teachings of Rudolf Steiner. A complete discretion is given to the "chairman and executive council of the society." A discretion to do what? To use the "remaining half of my "residuary estate" for carrying on the teachings of Rudolf Steiner. Now "to use," according to the Oxford English Dictionary, vol. x., "U," at p. 471, heading No. ii., sub-heading 7, means "to employ for a certain end or purpose." I am unable to see that I should be allowing the chairman and executive council of the society to employ half the residuary estate of the testatrix at their discretion for the stated purpose if I were to limit them as regards capital to investing it in suitable investments, and I do not think the words "carrying on" justify me in imposing any such limitation. This conclusion which I have reached purely on the wording of the will itself is, I think, supported by the facts that the constitution of the society does not appear to contemplate that the society, as distinct from the Anthroposophical Association, Ld., should hold permanent endowments and that the testatrix had herself been treasurer of the society and a donor of money to the association, yet she has given half of her residuary estate, not to the association, but to the society.

Mr. Vaisey argued, however, that, in any event, a bequest cannot be upheld on the principle of *In re Drummond* (2) if there is such uncertainty as to the purpose on which the bequest is to be expended that the court would be unable to come to a conclusion as to the propriety of any item of expenditure that might be challenged. Mr. Roxburgh agreed with this argument as a proposition of law, but said, and, in my judgment, correctly, that there was no such uncertainty in the case before me. Mr. Vaisey's proposition was that both the area and the content of Rudolf Steiner's teachings were so vague and indeterminate that the gift failed for uncertainty. So far as area was concerned, his argument was based on the wide range of Rudolf Steiner's writings as appearing from the catalogue of publications on "Anthroposophy" issued by the Rudolf Steiner bookshop, and it indicated that his writings ranged from philosophy and religion, through sociology, natural science, medicine and the art of healing to architecture, music and other arts. This is, no doubt, a wide range, but, although

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(1) [1914] 2 Ch. 90.

the range of subjects a man may claim to teach may cast doubts on the value of the instruction he gives, it cannot, I think, entitle the court to hold that his teaching is so uncertain that a gift to carry it on must fail. As regards content, Mr. Vaisey relies in part on the contents of the only piece of Rudolf Steiner's original work which is before the court. I cannot accept the views there expressed, but, at any rate, on the question of uncertainty the value of the teachings is immaterial. Mr. Vaisey also said that the court was without any other information as to the nature of Rudolf Steiner's teachings, but we have the evidence of Mr. Harwood, who is the teacher in the principal school conducted on Rudolf Steiner's educational principles. In his affidavit he says as follows: "The "teachings of Steiner are directed to the extension of knowledge "of the spiritual in man and in the universe generally and of "the interaction of the spiritual and the physical. He sought "to show both how this knowledge could be acquired and "how it could be applied for the benefit of man in a wide "range of activities. It could be acquired, he taught, by the "development of consciousness and with it of the per-"ceptive faculties. He expounded a theory of knowledge, the "philosophical basis of which is set forth by Steiner in certain "of his books, in particular 'The Philosophy of Spiritual "'Activity.' In such books he sought to show the capacity "of man for spiritual development leading to wider knowledge "of the spiritual or supersensible in the world at large. In "other books Steiner taught a method of mental and moral "discipline designed to train the imaginative, creative and "devotional faculties of the mind and so to develop the "faculties of spiritual intuition and perception. This teaching "is to be found in such a book as Steiner's 'Knowledge of the "'Higher Worlds and its Attainment.' In yet other books "and lectures Steiner taught and developed the application "of this knowledge to religion and education generally including "medicine, art and agriculture, for example, in his books "called 'Lectures to Teachers,' 'Christianity as Mystical "'Fact,' and his published lectures on the four gospels." This evidence is not challenged. It indicates the general lines of Rudolf Steiner's teachings, and I cannot think that the court would be unable, if the matter ever arose for decision, to decide on the evidence which would be adduced whether any item of expenditure that was challenged was or was not being expended in carrying on the teachings of Rudolf Steiner.

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I have, therefore, come to the conclusion that the principle of *In re Drummond* (1) applies, and I propose to declare that, on the true construction of the will of the testatrix, the gift of one-half of the net residuary estate of the testatrix to the Anthroposophical Society in Great Britain is a valid and effectual gift to the society, and that the society is at liberty to apply capital and income for the purposes of carrying on the teachings of Rudolf Steiner at the discretion of the chairman and executive council for the time being of the society.

As I have come to the conclusion that the gift does not tend to a perpetuity, it is not strictly necessary for me to decide whether the purpose for which this bequest was given is charitable, but, as the matter was fully argued, I might, perhaps, state shortly the reasons why I should have been inclined to hold that the purpose was charitable. I accept for my guidance the principles laid down in *In re Hummeltenberg* (2) to which Mr. Vaisey called my attention. Russell J. there referred (3) to the well-known classification of "charitable "gift" in *Pemsel's* case (4), and went on: "But no matter "under which of the four classes a gift may prima facie fall, "it is still, in my opinion, necessary (in order to establish "that it is charitable in the legal sense) to show (1.) that the "gift will or may be operative for the public benefit, and "(2.) that the trust is one the administration of which the "court itself could if necessary undertake and control." So far as the second point is concerned, I have already indicated my reasons for thinking that the court could, if necessary, control the administration of the trust, and I agree with Mr. Danckwerts that there would be no difficulty in formulating a scheme. I cannot, therefore, hold that the trust is one which the court would be unable, if necessary, to undertake and control. As regards the first point, I agree with Mr. Roxburgh (*a*) that, on the evidence, the teachings of Rudolf Steiner are directed to the mental or moral improvement of man; (*b*) that provided this teaching is not contra bonos mores the court is not concerned to decide whether it will result in the mental or moral improvement of anyone, but only whether, on the evidence before the court, it may have that result. I cannot say that the only piece of Rudolf Steiner's writings before the court would be likely to have that effect on me, but that, as was pointed out by the Master of the Rolls in *Thornton* v.

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(1) [1901] 2 Ch. 110.

(2) [1923] 1 Ch. 237.

(3) Ibid. 240, 241.

(4) [1891] A. C. 531.

Howe (1), is not the point. Sir John Romilly M.R., dealing with the question of charitable bequests, there said (2): "In "this respect, I am of opinion, that the Court of Chancery "makes no distinction between one sort of religion and "another. They are equally bequests which are included in "the general term of charitable bequests. Neither does the "court, in this respect, make any distinction between one sect "and another. It may be, that the tenets of a particular sect "inculcate doctrines adverse to the very foundations of all "religion, and that they are subversive of all morality. In "such a case, if it should arise, the court will not assist the "execution of the bequest, but will declare it to be void; "but the character of the bequest, so far as regards the Statute "of Mortmain, would not be altered by this circumstance. "The general immoral tendency of the bequest would make it "void, whether it was to be paid out of pure personalty or "out of real estate. But if the tendency were not immoral, "and although this court might consider the opinions sought "to be propagated foolish or even devoid of foundation, "it would not, on that account, declare it void, or take it out "of the class of legacies which are included in the general "terms charitable bequests." What is there said of religion would apply, I think, also to philosophy. I have before me the affidavits of Mr. Harwood and Mr. Barfield, who both depose to the beneficial effect on them. I have also Dr. Heidenreich's pamphlet giving his views on this point to the same effect. I have the further facts from Mr. Harwood's affidavit that societies for the propagation of Rudolf Steiner's teachings exist in many countries of Europe and in the United States of America. In these circumstances, I should be inclined to hold that the purpose of the bequest is a perfectly valid charitable purpose.

This view seems to me to be supported by the decision in *Macaulay* v. *O'Donnell* (3). Clauson J. in the court of first instance said: "The objects of the Theosophical Society are "thus expressed in the rules: '(A) To form a nucleus of the "'universal brotherhood of humanity, without distinction of "'race, creed, sex, caste, or colour; (B) to encourage the "'study of comparative religion, philosophy and science; "'(C) to investigate the unexplained laws of nature and the "'powers latent in man.' To my mind, on the authorities

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(1) 31 Beav. 14.
(2) Ibid. 19.
(3) July 10, 1933. *See* Note, p. 435, post.

"as they stand, if the objects had been confined to (B) and (C) "there would have been a very strong case for saying the "object of this society was an object for philosophical and "scientific research and for the general improvement of those "engaged in study of that character, and I think there would "be a strong case for holding that the objects of the lodge were "charitable. There is, however, a question because of "object (A), which seems to me to be clearly associated with "the other two. I must confess, speaking for myself, after "all the arguments I have heard I am left in doubt as to "whether or not object (A) does not have the effect of extending the objects of the society to objects which are not "clearly charitable." From this passage it would seem that Clauson J. would have held that objects (B) and (C) of the Theosophical Society were valid and charitable purposes, and the observations of Lord Tomlin in the House of Lords indicate that he did not dissent from this view. I will refer to one passage in the speech of Lord Tomlin. After stating the objects of the Theosophical Society (which I need not read again), Lord Tomlin said: "Whatever may be said of the "objects indicated in clauses (B) and (C), the object covered "by clause (A) read by itself cannot, in my opinion, be regarded "as charitable. I am content to take the explanation of that "clause given by Mr. Leonard Syer-Bristowe, who filed an "affidavit on behalf of the respondents. He said: 'In the "' first object of the society, namely, " to form a nucleus of "' "the universal brotherhood of humanity without distinction "' "of race, creed, sex, caste or colour," the nucleus referred to "' means a central body of persons formed to study and "' understand the principles of Theosophy as a nucleus to "' which other individuals can be added.' I see no reason "to think that this statement (though its admissibility as "evidence is open to question) is not a fair and accurate "statement of the purpose of the clause and the clause so "regarded discloses, in my opinion, no charitable objects at "all. But it is said that the three clauses should be read "together, and so read should be construed so as to confine "the object of cl. (A) to the formation of a body devoted "exclusively to carrying out the objects indicated in cl. (B) "and (C) respectively. I do not think the clauses can be so "read. Each clause, in my opinion, expresses a distinct and "independent object. Even if, however, there be inter-"dependence between the clauses, I do not see how cl. (A) "can be considered as having for its object merely the formation "of a body to be devoted exclusively to carrying out the "objects of the other two clauses." Now the objects (B) and (C) of the Theosophical Society bear a distinct resemblance to the objects of the Rudolf Steiner teachings as explained by Mr. Harwood and Dr. Heidenreich, and, had it been necessary for me to deal with the point, I should have been inclined to uphold the gift to the Anthroposophical Society as a valid charitable gift.

Solicitors: *Geo. Bower & Son; Barfield & Barfield; John B. Borer, for G. T. Methold, Guildford; Treasury Solicitor.*

H. L. L.

[NOTE.]

In re MACAULAY'S ESTATE.

MACAULAY *v.* O'DONNELL.

By her will dated November 9, 1928, the testatrix, Mary Margaret Macaulay, devised and bequeathed all her residuary estate "unto the "Folkestone Lodge of the Theosophical Society (but not to the head- "quarters or other Lodges of such society) absolutely for the mainten- "ance and improvement of the Theosophical Lodge at Folkestone," and declared that the receipt of the treasurer of the Lodge should be a sufficient discharge.

The testatrix died on January 27, 1931, and her will was duly proved in June, 1931. The said Lodge was an unincorporated and financially autonomous association founded by charter in 1909 "subject to the "constitution and rules of the Theosophical Society and to the jurisdic- "tion of the Theosophical Society in England." The unincorporated association known as the Theosophical Society in England was a component of the Theosophical Society founded in 1875 by Helena Blavatsky and others and incorporated in British India in 1905, under an Indian Act of 1860 based on the Literary and Scientific Institution Act, 1854.

The objects of the parent society as set out in its memorandum of association were as follows: (*a*) to form a nucleus of the universal brotherhood of humanity without distinction of race, creed, sex, caste, or colour; (*b*) to encourage the study of comparative religion, philosophy and science; (*c*) to investigate unexplained laws of nature and the powers latent in man; and ancillary objects including maintenance of libraries. The Folkestone Lodge held a lease of certain premises at Folkestone, used for meetings and study, to which the public were not, in general, admitted.

On June 13, 1931, the executors of the will took out an originating summons to determine whether the gift to the society was valid. Clauson J. held that the gift was to an unincorporated society and that effect could be given to it without holding the property, and applying the income only for the benefit of the society, and that on the authorities he was bound to hold that the gift was valid. On appeal from this decision the Court of Appeal dismissed the appeal, holding that the gift created no trust, and therefore no question of perpetuity or charity arose.

The appellant appealed to the House of Lords.

The appellant, David Ibbetson Michael Macaulay, in person.
F. R. Evershed for the plaintiff.
F. K. Archer K.C. and C. D. Myles for defendant next-of-kin.
Stafford Crossman for the Attorney-General.
P. M. Walters for the Public Trustee.

LORD BUCKMASTER having stated the questions and referred to the judgment of the Court of Appeal, proceeded.

Had this judgment depended on the determination of principles of law, it would have required a strong case to show that such unanimous opinion was incorrect, but it will be found that there is no real dispute in this case as to legal principles, and that the real question is as to the meaning of the peculiar phraseology used by the testatrix, and upon this opinions may well vary.

In the first place it is clear that the mere fact that the beneficiary is an unincorporated society in no way affects the validity of the gift . . . . The real question is what is the actual purpose for which the gift is made. There is no perpetuity if the gift were for the individual members for their own benefit, but that, I think, is clearly not the meaning of this gift. Nor again is there a perpetuity if the Society is at liberty in accordance with the terms of the gift, to spend both capital and income as they think fit.

[His Lordship then referred to *In re Drummond* (1) and *Carne* v. *Long* (2), and proceeded :] These two cases illustrate exactly the point for consideration. If the gift is to be for the endowment of the society, to be held as an endowment, and the society is, according to its form, perpetual, the gift is bad, but if the gift is an immediate beneficial legacy, it is good.

In the present case all the learned judges have been greatly impressed by the use of the word " absolutely " in the terms of the gift, but it appears to me that the more important words are those which impress upon the absolute gift the purpose for which it is to be used, and they are " the maintenance and improvement " of the Theosophical Lodge at Folkestone, words which I find it difficult to distinguish from the words used in *Carne* v. *Long* (2).

It was argued in the Court of Appeal that this referred to the building, and that if that were the case the gift would be bad. But that argument was rejected, and I do not think there is any ground for questioning that conclusion. But the maintenance and improvement of an institution appears to me to imply with regard to the institution a duty similar to that which would have been applicable to the building. Maintenance, in itself, seems to be continuous, and apart from the purchase of books and buildings, it is difficult to see what could have been intended as the object for the immediate application of the money. The money can only properly be used for the specific purpose, and its application for these objects is engrafted on and affixed to the absolute ownership. All trusts are in fact attached to the absolute fiduciary ownership, and in my opinion such trust is imposed here and is not of a nature to permit the spending of the money in any manner decided on for the benefit of the society. It follows, therefore, that the gift does offend against the rule of perpetuity, and must therefore be declared void. It is then argued that none the less the objects of the society are charitable within the legal meaning of the phrase. Now the first object is " to form a nucleus of Universal Brotherhood of " Humanity without distinction of race, creed, sex, caste, or colour." Unless the word " nucleus " had in relation to this society a special meaning, evidence as to its meaning would not be properly admissible, but in an affidavit made by Mr. L. S. Bristowe and Madame Mercault, they said, in terms which I am prepared to accept, that it means a central body of persons formed to study and understand the principles of theosophy, as a nucleus to which other individuals could be added.

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(1) [1914] 2 Ch. 90.
(2) 2 De G. F. & J. 75.

This by itself, however wise and estimable it may be, is certainly no charitable purpose, nor can I see that it is so connected with others which are stated as separate and distinct objects as to connect it into a charitable object, even if the latter objects could themselves be regarded as charitable. They are indeed said to be objects the study of which lead up to the Universal Brotherhood of Humanity, but as Clauson J. has pointed out, there is strong ground for thinking that is not a charitable purpose. For these reasons I do not think the charitable nature of this bequest is established. The appeal therefore ought to be allowed. The judgment of the Court of Appeal will be reversed, but the costs of all parties will come out of the estate.

LORD TOMLIN, after stating the question, said : Now I may say at once that in my view the word " absolutely " in the context in which it appears has reference to the quality of the estate taken by the donee, and does not bear upon the question whether in the hands of the donee a trust is or is not annexed to the gift.

The critical words are the words " for the maintenance and im-" provement of the Theosophical Lodge at Folkestone." It is not suggested that those words do nothing more than indicate the motive of the testatrix in making the gift. On the contrary, it is not disputed that they impose some trust. If so, what is the trust ? That is a matter upon which there is obviously room for differences of judicial opinion, but my mind is satisfied that by these words in the context in which they are used the testatrix intended to create an endowment to secure the continuance of the Lodge at Folkestone, so that the fund comprised in the gift must be retained as an invested fund, fulfilling by means of its income the purposes which the testatrix had in mind.

That the Lodge to be maintained is a body or association of persons, and not the building occupied by such body or association I have no doubt. Further, the fact that the gift is made to the Lodge by the name prescribed by its rules, namely, the Folkestone Lodge of the Theosophical Society, and is coupled with an express exclusion from the benefit of the gift of the headquarters and other lodges of the

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PRICE, *In re.*

MIDLAND BANK EXECUTOR AND TRUSTEE CO. *v.* HARWOOD.

Society, makes it plain that it is the local body or association at Folkestone and no other body which is to benefit.

Why then were there added the words "for the maintenance and "improvement of the Theosophical Lodge at Folkestone"? To my mind these words have been added in order to express that it is the permanency of the Lodge at Folkestone which the testatrix is seeking to secure, and this I think necessarily involves endowment.

The use of the word improvement in addition to the word maintenance does not in my opinion weaken the argument. If endowment is of the essence of the gift in order to secure the purpose of maintenance there is nothing inconsistent in making that which is available for expenditure on maintenance, namely, the income of the fund, available also for some other purpose, such as improvement.

In my opinion, the will upon its true construction provides for a trust under which the corpus of the gift must be permanently maintained as an endowment of the Lodge and creates a perpetuity.

The question then arises whether the gift can be supported as a charitable gift. [His Lordship then referred to the objects of the Society, as set out above, and continued:] Whatever may be said of the objects indicated in clauses (*b*) and (*c*) the object covered by clause (*a*) read by itself cannot in my opinion be regarded as charitable. I am content to take the explanation of that clause given by Mr. Leonard Syer-Bristowe who filed an affidavit on behalf of the respondents. He said: "In the first object of the Society, 'to form a nucleus of "'the Universal Brotherhood of Humanity without distinction of "'race, creed, sex, caste, or colour,' the nucleus referred to means "a central body of persons formed to study and understand the "principles of Theosophy as a nucleus to which other individuals can "be added."

I see no reason to think that this statement (though its admissibility as evidence is open to question) is not a fair and accurate statement of the purpose of the clause and the clause so regarded discloses in my opinion no charitable objects at all. But it is said that the three clauses should be read together, and so read should be construed so as to confine the object of clause (*a*) to the formation of a body devoted exclusively to carrying out the objects indicated in clauses (*b*) and (*c*) respectively. I do not think the clauses can be so read. Each clause, in my opinion, expresses a distinct and independent object. Even if, however, there be interdependence between the clauses I do not see how clause (*a*) can be construed as having for its object merely the formation of a body to be devoted exclusively to carrying out the objects of the other two clauses. Such a construction would, I think, ignore or deprive of significance the language employed which points to something more than the creation of machinery. In the result, therefore, the gift, in my opinion, fails as creating a perpetuity for a non-charitable purpose. My Lords, I think that the appeal should be allowed, and it should be declared that the gift fails.

Solicitors: *Gibson & Weldon, for Berry & Berry, Tunbridge Wells; Marsden, Burnett & Davy; Treasury Solicitor.*

H. L. L.

END OF VOL. AND OF CHANCERY SERIES FOR 1943.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1943, will be as follows :—

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2. —— Waste — Mining leases granted by former tenant for life unimpeachable for waste—Present tenant for life impeachable for waste—Apportionment of rents. *See In re* Fitzwalter, sub tit. Settled Land.

MORTGAGE—*Leasehold—Option to purchase freehold reversion—Right to exercise option assigned to mortgagee—Option exercised by mortgagee—Foreclosure—Claim by mortgagor to redeem mortgaged property together with freehold reversion.*
Nelson *v.* Hannam - - - **C. A. 59**

2. —— "Mortgage money"—Inclusion of interest. *See* Russell *v.* Weinreb, sub tit. Emergency Legislation (Mortgage).

3. —— *Receiver — Account — Appointment by mortgagee—Duty to account to mortgagee—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 109, *sub-s.* 8 (*ii.*), (*v.*).
Leicester Permanent Building Society *v.* Butt - - - - **Bennett J. 308**

MORTGAGE—*continued.*

4. —— *Security — Non-disclosure of material information—Action against solicitor —Absence of intent to defraud—Competence—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 183, *sub-s.* 2.

In the absence of proof of intent to defraud, no action will lie at the suit of a mortgagee under s. 183, sub-s. 2, of the Law of Property Act, 1925, against the mortgagor or his solicitor for failing to disclose any instrument or incumbrance material to the title.
District Bank, Ld. *v.* Luigi Grill, Ld.
Lord Clauson 78

PERPETUITIES (RULE AGAINST) — Gift to unincorporated association for certain objects—Limited purpose—Perpetuity—Freedom of association to spend capital and income on stated purpose. *See In re* Price, sub tit. Will, and also under Power of Appointment.

POWER OF APPOINTMENT — *Exercise of power in favour of eldest son—Gift over to younger children—Validity of appointment—Gift over void as infringing rule against perpetuities.*
In re Pratt's Settlement Trusts
Cohen J. 356

2. —— *Rule against perpetuities — Remoteness—Direction to raise capital to supply deficiency in income—Interest in capital contingent on events—Gift over—Validity.*
In re Johnson's Settlement Trusts
Cohen J. 341

PRACTICE—Costs. *See* Costs.

2. —— Discovery. *See* Discovery.

3. —— *Setting aside judgment on ground of fraud — Action to impeach judgment — Imposition of terms on plaintiff—R. S. C., Or.* XXVII., *r.* 15.
Kennedy *v.* Dandrick - **Morton J. 291**

PUBLIC POLICY—Will—Bequest—Validity—Gift to son absolutely—Modification of gift "if his present wife be "alive and married to him"—Absolute gift to take effect "if "his said wife shall die or his "said marriage be otherwise terminated." *See In re* Caborne, sub tit. Will.

RAILWAY—Coal mine—Area of protection—Notice of intention to work minerals—Counter-notice to leave minerals unworked—Compensation payable by railway company — Assessment—Possible liability of mineowner to railway company if minerals worked—Date of payment of compensation — Discount. *See* B. A. Collieries, Ld. *v.* L. & N. E. Ry., sub tit. Mine.

RESTRAINT OF TRADE — Covenant. *See* Contract.

REVENUE—*Estate duty—Testator killed in war — Remission of duty — Computation — Apportionment of remission—Finance Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 15), *s.* 44—*Finance Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 21), *s.* 38.
In re Joel - - - - **C. A. 311**

2. —— —— *Will — Legacy — Disclaimer —" Competent to dispose of " — " During the " continuance of the settlement " — Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 2 ; *s.* 22, *sub-s.* 2 (*a*).
In re Parsons - - - **C. A. 12**

3. —— *Income tax—Settlement—Annuity free of income tax—Direction to trustees to pay tax — Agreement for payment of annual payment without deduction of tax—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 23 (2.).
In re Goodson's Settlement
Uthwatt J. 101

SETTLED LAND—*Tenant for life—Option to son to purchase settled property after death of tenant for life—Sales by tenant for life of part of settled property—Right of son to exercise option over proceeds of sales—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 75, *sub-s.* 5.
In re Armstrong's Will Trusts
Cohen J. 400

2. —— —— *Waste — Mine — Mining leases granted by former tenant for life unimpeachable for waste—Present tenant for life impeachable for waste—Apportionment of rents—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 47.
In re Fitzwalter - - - **C. A. 285**

SETTLEMENT—Annuity free of income tax—Direction to trustees to pay tax—Agreement for payment of annual payment without deduction of tax. *See In re* Goodson's Settlement, sub tit. Revenue (Income Tax).

2. —— *Construction — Instrument made before January* 1, 1926—*Declaration of trust by reference to statutes of distribution — Ascertainment of class — Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 50, *sub-s.* 2.
In re Hooper's Settlement - **C. A. 116**

3. —— —— *Life interest in settled fund —Covenant to make up annual income to* 3000*l. after deduction of income tax and payment of super-tax—Death of annuitant —Assessment to sur-tax payable after death—Liability of settlor's estate — Exoneration of annuitant.*
In re Sharman's Settlement
Bennett J. 5

SETTLEMENT—*continued.*

4. —— Infant — Post-nuptial settlement—Sanction of court — Infant not a ward of court. *See In re* ADAMS, sub tit. INFANT.

5. —— *Limitation of tenancy in tail—Remainder vesting in children of daughter—" First and other sons " — Implication of successive, not concurrent, interests.*
In re GOSSET'S SETTLEMENT **Cohen J. 351**

6. —— *Lost settlement — Evidence — Secondary evidence of contents—Payment out of fund in court.*
HANSELL *v.* SPINK - **Morton J. 396**

SOLICITOR—Mortgage — Security — Non-disclosure of material information—Action against solicitor — Absence of intent to defraud—Competence. *See* DISTRICT BANK, LD. *v.* LUIGI GRILL, LD., sub tit. MORTGAGE.

TOMB—Maintenance and rebuilding — Conditional gift to charity—Validity. *See In re* DALZIEL, sub tit. WILL (CHARITY).

TRADING WITH THE ENEMY. *See In re* GOURJU'S WILL TRUSTS, sub tit. TRUST.

TRUST — *Protective trusts — Forfeiture — Income of residuary estate—Principal beneficiary deprived of right to receive the same—Residence in France—Emergency legislation — Trading with the enemy — Payment of income to Custodian of Enemy Property—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 33, *sub-s.* 1—*Trading with the Enemy Act,* 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 7, *sub-s.* 1—*Trading with the Enemy (Custodian) Order,* 1939 (*St. R. & O.,* 1939, *No.* 1198), *para.* 1 (*ii.*), (*i.*).
In re GOURJU'S WILL TRUSTS
Simonds J. 24

2. —— *Sale — Power — Investment —Bequest to trustees on trust to pay income to life-tenant—Remainder to other persons as to capital and income—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 1, *sub-s.* 1; *s.* 57, *sub-s.* 1.
In re PRATT'S WILL TRUSTS **Morton J. 326**

VENDOR AND PURCHASER—Sale of land —War damage contribution—Payment of purchase price by instalments—Liability of vendor. *See In re* WATFORD CORPORATION'S AND A. S. WARE'S CONTRACT, sub tit. EMERGENCY LEGISLATION (VENDOR AND PURCHASER).

2. —— *Underlease—Sale by underlessee—Title to begin with underlease—Previous disclaimer of head lease by trustee in bankruptcy*

VENDOR AND PURCHASER—*continued.*

of underlessor—Title of underlessee—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 54, *sub-ss.* 1, 2.
In re THOMPSON AND COTTRELL'S CONTRACT - - - - **Uthwatt J. 97**

WAR DAMAGE. *See* EMERGENCY LEGISLATION.

WASTE—Mine—Mining leases granted by former tenant for life unimpeachable for waste—Present tenant for life impeachable for waste—Apportionment of rents. *See In re* FITZWALTER, sub tit. SETTLED LAND.

WILL — Administration. *See* ADMINISTRATION.

2. —— *Annuity — Will made before September* 3, 1939—*Annuity free of income tax—Trust for residuary legatees—Deed of appropriation and release executed in* 1940—*Fund out of estate to answer annuities — Balance to residuary legatees—Variation of provision in will—Finance Act,* 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.
In re WESTRIK - - **Farwell J. 3**

3. —— *Bequest—Validity—Public policy —Gift to son absolutely—Modification of gift " if his present wife be alive and married to " him "—Absolute gift to take effect " if his " said wife shall die or his said marriage be " otherwise terminated."*
In re CABORNE - - **Simonds J. 224**

4. —— *Bequest of house together with contents—Single gift.*
In re JOEL - - - - **C. A. 311**

5. —— *Charity — Tomb — Maintenance and rebuilding — Conditional gift to charity—Validity.*
In re DALZIEL - - **Cohen J. 277**

6. —— *Construction — Annuity — Acceleration—Provision for payment after death of tenant for life—Disclaimer by tenant for life of interest under will.*
In re HODGE - - **Simonds J. 300**

7. —— —— *Executory trust — Direction to trustees to settle daughter's share on her marriage — " For benefit of my daughter " and that of any children she may have "—Husband's and wife's funds settled on children of marriage—Death of husband, and second marriage of wife—Right of children of second marriage to share with those of first marriage.*
In re POTTER'S WILL TRUSTS. *In re* THOMSON'S SETTLEMENT TRUSTS
Bennett J. 255

8. —— —— *Name and arms clause—Gift over on " neglect " to take name and arms of testator—Absence of knowledge of condition —Compliance.*
In re HUGHES - - **Simonds J. 296**

WILL—*continued.*

9. —— *Election — Condition requiring legatee to elect whether he will settle reversionary interest—Letters to trustees stating intention to execute settlement—Obligation to execute settlement.*
In re SHEPHERD - - **Bennett J. 8**

10. —— *Gift to unincorporated association for certain objects—Limited purpose — Perpetuity—Freedom of association to spend capital and income on stated purpose — Charitable bequest.*
In re PRICE - - - **Cohen J. 422**

11. —— Legacy — Disclaimer — Estate duty—"Competent to dispose of"—"During the continuance of the "settlement." *See In re* PARSONS, sub tit. REVENUE: ESTATE DUTY.

12. —— *Statutory trust for sale—Refusal by trustees to sell—Order directing trustees to give "effect to proposed transaction"—Such order as court thinks fit—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 30.
In re MAYO - - - **Simonds J. 302**

WINDING-UP. *See* COMPANY.

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